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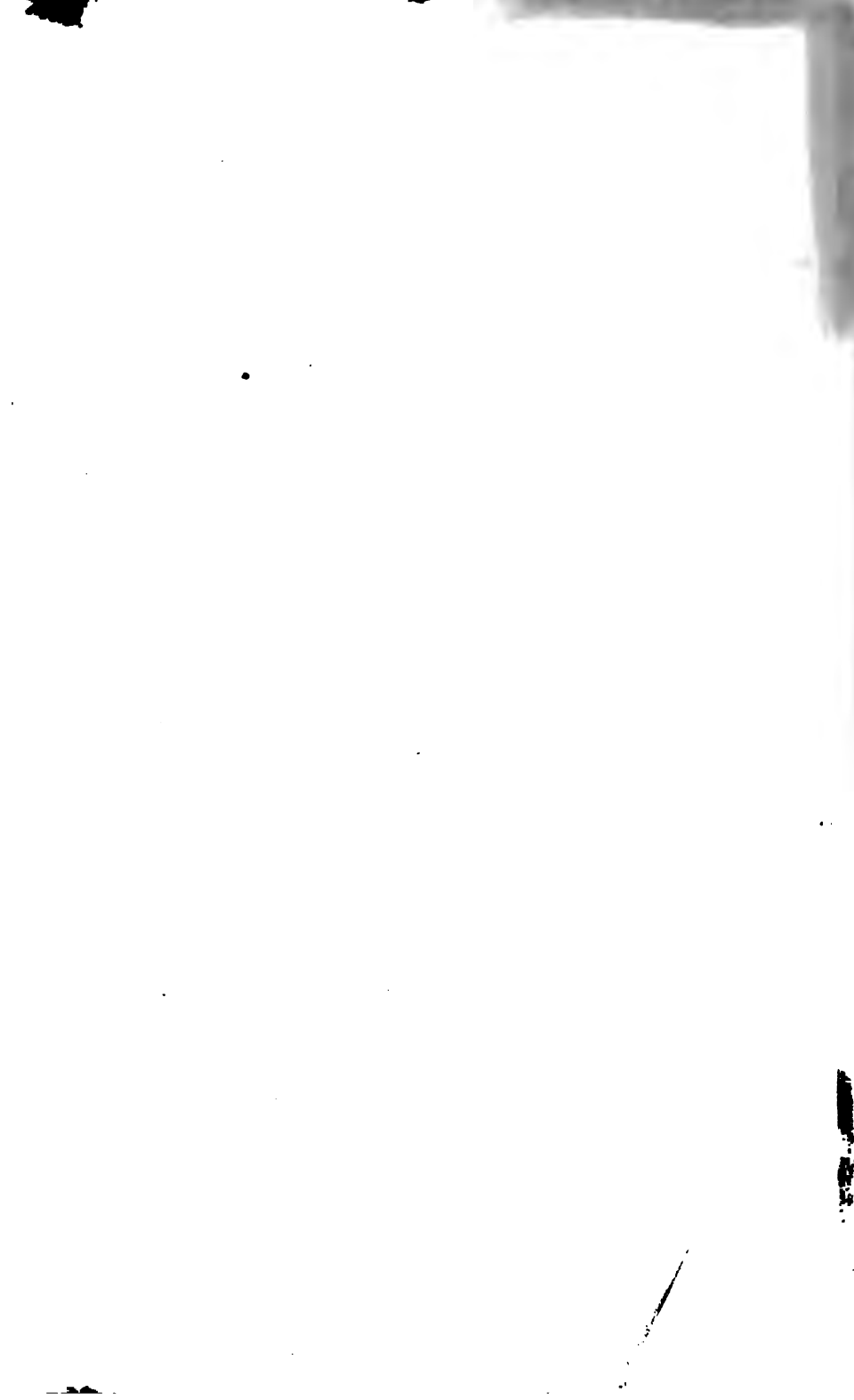
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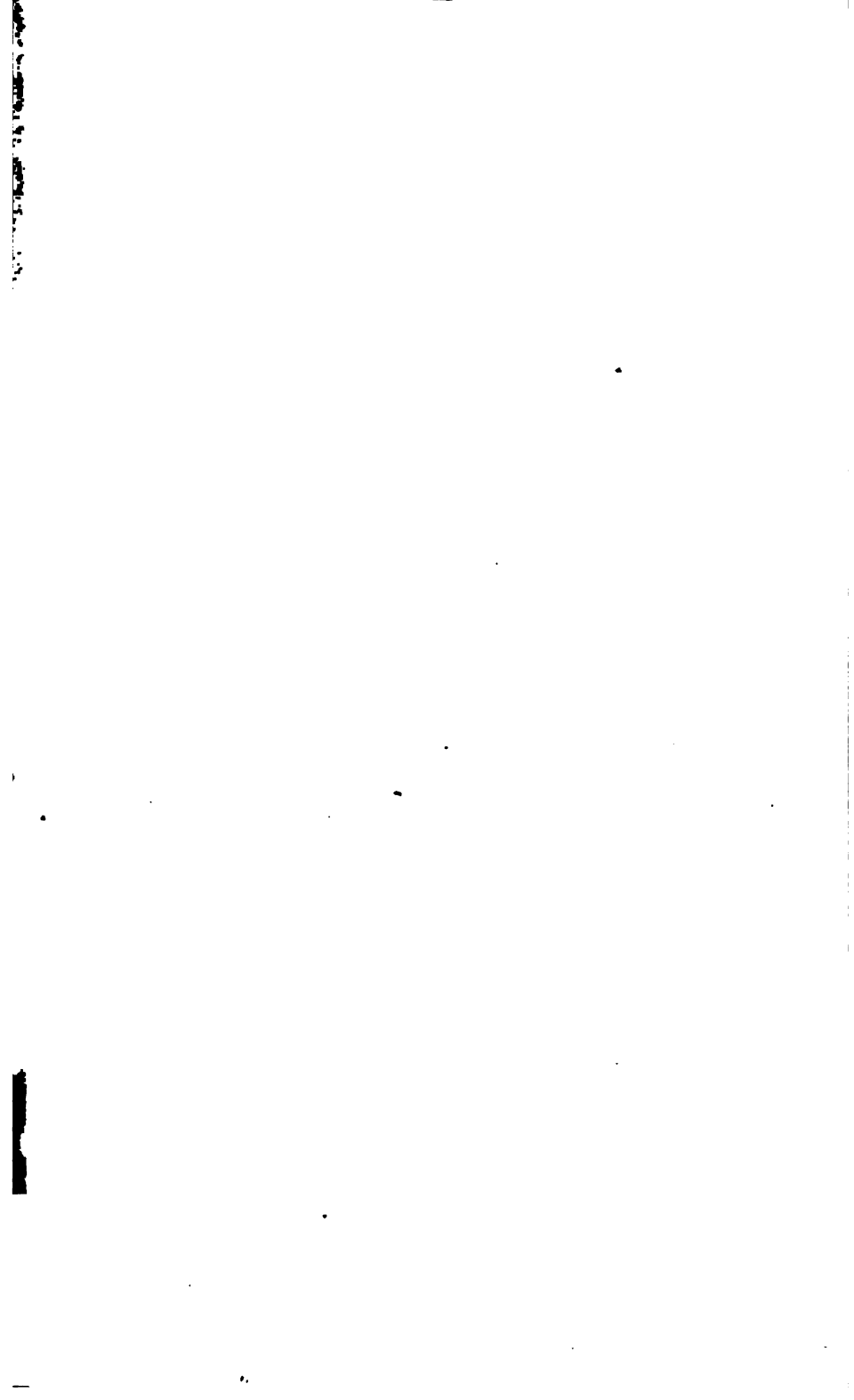
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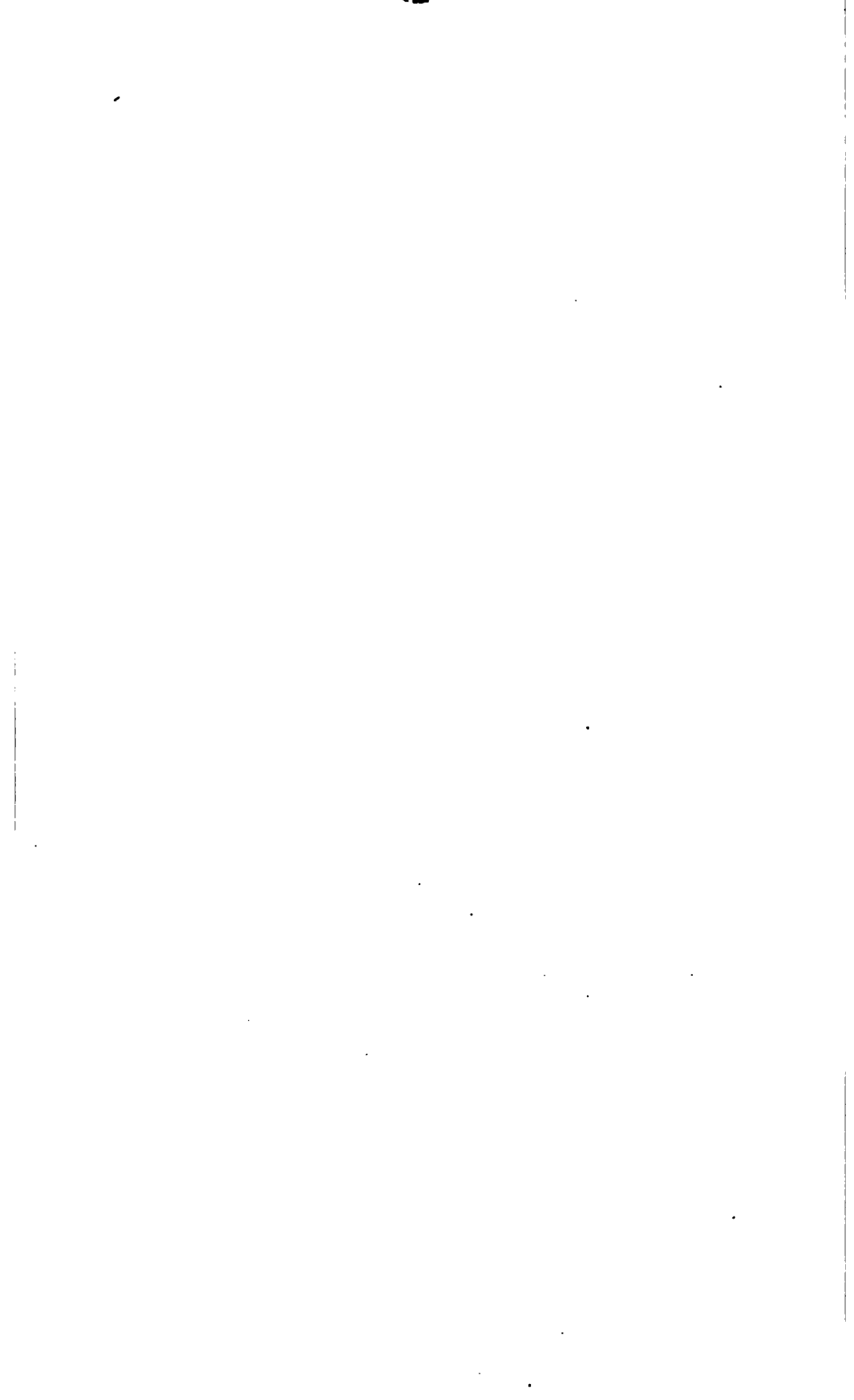
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THE
LAW STUDENTS'
MAGAZINE.

FROM

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LETTERS ON SIMPLE CONTRACTS.

[Continued from vol. v., p. 497.]

Letter V. Stamps on agreements—Contracts not stamped—The Stamp Acts—Exempted agreements for hire of labourers, sale of goods, letters between traders by post—Executory contracts—Of the value of £20—Documents under seal, and under hand—Several contracts—Incorporation of other agreements—Progressive duty—Proposals—Acknowledgments—Alterations in contracts—Agreements in foreign countries—Statute of Limitations—Unstamped agreements—Construction of Stamp Acts.

Stamp Acts do not require contract to be in writing.—We now proceed to notice the provisions of the Stamp Acts imposing a stamp duty on agreements or contracts, which have been reduced to writing. It is to be observed that the Stamp Acts apply only to agreements or contracts in writing, and that they do not compel parties to reduce their contracts or agreements into writing, but leave the parties, if so minded, to rest their contract upon oral testimony, and so avoid the payment of that duty which, if the contract had been reduced into writing, would have been payable. In this respect the provisions of the Stamp Acts present a contrast to those of the Statute of Frauds, and this distinction leads to very important differences. Thus, if there should be a written unstamped agreement, yet if the party can prove the terms of it by the oral testimony of witnesses not cognizant of, or not examined as to the existence of the written contract, he may do so, for as the existence of the written contract is not shown by the plaintiff's witnesses, there is nothing to prevent the oral testimony from being received. It will not do for the defendant afterwards to produce the written unstamped agreement, with a view to defeat the plaintiff's claim, for the courts will not notice it, and, therefore, the oral evidence is the only evidence which the courts have to guide them. In such a case, if the defendant be desirous to avail himself of the written agreement, he must produce the same duly stamped, and then, on the principle that it is evidence of the contract superior to that which depends on the mere memories of witnesses, it will be taken as containing the real contract between the parties (see *Stevens v. Pinney*, 2 Moore, 349; *Curtis v. Greathead*, 1 Adol. and Ellis, 167; *Roscoe's Evid.* pp. 2, 3, 5th edit.). "It is a conclusion of law that where parties have agreed by parol [orally], and afterwards reduce that agree-

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ment into writing, the writing, and not the parol, constitutes the contract between them. * * * Where two parties hold a conversation in the morning, and in the afternoon reduce the subject of it into writing, the writing is the contract" (*per* Pollock, C.B., in *Knight v. Barber*, 10 Jur. 929; 16 Mees. and W. 66).

From what has just been mentioned, it is evident that a plaintiff relying upon oral testimony, where there is a written unstamped contract, runs a great risk, for should his witnesses disclose either on their examination in chief or on their cross-examination that the agreement was reduced into writing, he will be nonsuited, for in such case, as it appears there is a written agreement, and that is the best evidence of the terms of the contract between the parties, it must be produced, duly stamped, by the plaintiff, who is always bound to produce the best evidence in his power. The agreement being unstamped the court cannot look at it, so that the plaintiff has failed to give the best evidence of which his case is susceptible (see *Brewer v. Palmer*, 3 Espin. 213; *Doe v. Morris*, 12 East, 237; *Roscoe's Evid.* pp. 2, 3, 5th edit.).

It is to be observed that in order to compel a plaintiff to produce the written agreement, and to preclude him from giving oral evidence of the existence of the contract, the witnesses must have not merely a vague notion that there is a written agreement in relation to the subject-matter of the action, but that it is between the same persons as are parties to the action (*Doe v. Morris*, *suprà*; *Fenn v. Griffith*, 6 Bing. 533).

Stamp Acts—55 Geo. 3, c. 184—13 and 14 Vict. c. 97.—The principal statute relating to stamps is the 55 Geo. 3, c. 184, which has, however, as to agreements, been altered so as to reduce the amount of duty payable thereon. By the 55 Geo. 3, c. 184, an agreement, the matter of which was of the value of £20 or upwards, required a stamp of the value of £1, if not containing more than fifteen folios; if more than fifteen folios, £1 15s., and for every entire quantity of fifteen folios, over and above the first fifteen folios, a further progressive duty of £1 5s. The £1 stamp was, by the 7 and 8 Vict. c. 21, reduced to 2s. 6d., but the progressive duty remained the same. However, by the 13 and 14 Vict. c. 97, the progressive duty is reduced to 2s. 6d. By this last act it is provided that an "agreement, or any minute or memorandum of agreement made in England or Ireland under hand only, or made in Scotland without any clause of registration (*not charged otherwise than under the head "agreement" in the schedule to the act 55 Geo. 3, c. 184, nor expressly exempted from all stamp duty*), where the matter thereof shall be of the value of £20 or upwards, whether the same shall be only evidence of a contract, or obligatory upon the parties from its being a written instrument, together with every

schedule, receipt, or other matter put or indorsed thereon, or annexed thereto, 2s. 6d. And where the same shall contain 2,160 words [30 folios] or upwards, then for every entire quantity of 1,080 words [15 folios] contained therein, over and above the first 1,080 words [15 folios] a further *progressive* duty of 2s. 6d."

Exempted agreements—No stamp-duty.—There are certain agreements exempted from stamp duties by the 55 Geo. 3, c. 184, and some other acts, the more important of which (contained in the 55 Geo. 3. c. 184) are, firstly, those for the hire of labourers, artificers, manufacturers, or menial servants; secondly, those made for or relating to the sale of any goods, wares, or merchandise; thirdly, letters containing any agreement in respect of any merchandise, or evidence of such agreement, which shall pass by the post between merchants or other persons carrying on trade or commerce in Great Britain, and residing and actually being, at the time of sending such letters, at the distance of 50 miles from each other.

We propose to notice the above exemptions from duty before considering the provisions of the statute imposing a duty.

Hiring of labourers, &c.—Exemption from stamp duty.—The 55 Geo. 3, c. 184, contains, as above stated, an exemption from stamp duty in the case of a "Memorandum or agreement for the hire of any labourer, artificer, manufacturer, or menial servant." It has been held that the assignment of an apprentice is not within the above exemption (*Rex v. St. Paul's, Bedford*, 6 Term Rep. 452). It has been held that an instrument in the following form is a contract for service by a labourer, and not a contract of partnership, and being within the exemption in the Stamp Act, is admissible in evidence without a stamp :—"S. W. engages to take charge of the glebe land of the Rev. J. B. B. C., his wife undertaking the dairy and poultry, &c., at 15s. a week to Michaelmas, 1850, and afterwards at a salary of £25 a year, and a third of the clear annual profits after the expenses of rent, rate, labour, and interest on capital, &c., are paid on a fair valuation made from Michaelmas to Michaelmas. Three months' notice on either side to be given, at the expiration of which the cottage to be vacated by S. W., who occupies it as bailiff in addition to his salary (*Reg. v. Wortley*, 15 Jur. 1137; S. C. 2 C. C. R. 333; 21 Law Journ. N.S., M. C. 44). In this case Mr. Baron Alderson observed, "as there is no distinction made between the highest and lowest servants, down to the boy, so there is no distinction between one grade of labourers and another; the word 'labourer' includes them all." It has been decided that men engaged as firemen and stokers on board steamers are labourers and artificers within the meaning of the exempting clause in the 55 Geo. 3, c. 184 (*Wilson v. Zuluetta*, 14 Jur. 366). Such persons are not "seamen," within the meaning of the 7 & 8

Viot. c. 112, which exempts agreements executed in compliance with its provisions from stamp duty.—(*Ibid.*)

Sale of goods, &c.—Exempt from stamp duty.—The next exemption from stamp duty which we purpose to notice is the case of a "memorandum, letter, or agreement made for or relating to the sale of any goods, wares, or merchandise." There have been many decisions on this clause of exemption, the principal only of which we can here mention. Some of the decisions usually classed under this head of exemption relate to the construction to be put on the fourth and seventeenth sections of the Statute of Frauds, for if the contract relate to an interest in land within the meaning of the 4th section of the Statute of Frauds, it cannot be within the exemption in the Stamp Act, while if the contract be within sec. 17, it must be because it relates to the sale of goods, and then it is brought within the exemption clause of the Stamp Act. This view is borne out by Mr. Tilsley in his work on Stamps (p. 49), though in another place (p. 44) he seems to contradict himself. At the former page he says, "The determination, with reference to the Statute of Frauds, in any case, whether the sale of certain produce of land is a sale of goods and chattels, or of an interest in land, disposes, at the same time, of the question of stamp duty on the agreement, the point in both instances being identical."

An agreement to cancel a former agreement relative to the sale of goods, and for the future sale of goods upon different terms, is exempted from stamp duty. The primary object is, in such cases, the sale of goods, and the cancelling of the former agreement is but a mode of carrying out the intentions of the parties. (*Whitworth v. Crockett*, 2 Stark. 431.) The general rule is that the exemption from stamp duty is confined to those contracts where the sale of goods is the primary and immediate object. Thus agreements by brokers to indemnify their principals and employers against loss on the resale of goods purchased by them, provided the primary object of the writing is a purchase or sale of goods, and the guarantee or indemnity against loss secondary and subsidiary thereto, do not require a stamp. If a primary object of the written undertaking or guarantee, however, be the obtaining of money upon a pledge of goods, it does not come within the exemption, although it may authorise the party making the advance to sell the goods when they come to hand, in satisfaction and discharge of the sum borrowed. Thus, where a principal, in a letter to his factor inclosing bills for the acceptance of the latter, promised to provide funds for the bills if certain goods about to be placed in the factor's hands should remain unsold at the time of the bills falling due, it was held that this letter did not come within the exemption of the Stamp Act, and could not be given in evidence unless it were stamped with an agree-

ment stamp, as the primary object of the letter was the obtaining of money upon a pledge of goods, and the sale only a secondary or collateral object. (*Smith v. Cator*, 2 Barn. and Ald. 778). It is not necessary, in order that a contract should come within the above exemption, that money is to be paid after the delivery of the goods: it will be sufficient that the consideration is the cancelling of a precedent debt. In other words, where there is a transfer of the property in goods for a pecuniary consideration, that is a sale of goods, whether they are to be paid for by cancelling a debt or by a set-off. Thus, where C. and W., being indebted to defendant, and being requested by him to supply plaintiff with Roman cement to the value of £48 13s. 10d., and charge the same to the amount of the debt, wrote the following letter to plaintiff:—"On the consideration above-named, we agree to supply to your order, when you shall require it, Roman cement to the amount of £48 13s. 10d.:" held an agreement for the sale of goods within the exemption of the statute 55 Geo. 3, c. 184, sched. part 1, "agreement." (*Chatfield v. Cox*, 16 Jur. 594; S. C. 21 Law Journ., N. S., Q. B. 279). Lord Campbell observed that the above was an agreement relating to the sale of goods, just as much as a guarantee on the sale of goods, which, as we shall see, is exempt from duty.

Guarantees.—As we have seen, contracts and agreements for the sale of goods, wares, and merchandises are exempted from stamps, under which provision it has been held that guarantees for the payment of the price of goods sold to a third party are within the exemption of the statute, and do not require to be stamped (*Martin v. Wright*, 6 Qu. Ben. Rep. 917; S. C. 9 Jurist, 178; *Warrington v. Furber*, 8 East, 542). But the insertion in the guarantee of any clause or stipulation having reference to any other matter or thing than goods will render the guarantee subject to a stamp duty, inasmuch as it will not then be within the exempting provisions of the statute (*per* Lord Denman in *Martin v. Wright*, *supra*; *Wharton v. Walton*, 9 Jur. 638, S. C. Qu. Ben. Rep. 474). The following document has been held to be within the exemption of the Stamp Act, relating to the "sale of goods, wares, and merchandise":—"Gentlemen, in consideration of your consigning to my friends, Messrs. H. and Co., of Calcutta, sixteen casks of sherry wine, and engaging to pay me one per cent. on the amount of the proceeds, I hereby agree to guarantee you the proper sale of the said wines, and the payment of the proceeds in due time.—J. G." (*Saddler v. Johnson*, 16 Mees. and Wels. 775). The Court of Exchequer admitted that in cases of this kind it was difficult to draw the precise line, adding that as the exemption in the Stamp Act is for the purpose of protecting commerce, a liberal construction should be put upon it. It was admitted that the above contract in some degree related to the

conduct of the parties who were to sell the goods, but, it was said, that was only part of the machinery by which the sale was to be effected.

Contracts not confined to goods.—If the agreement be an entire contract for something more than a sale of goods, it is not within the exemptions of the statute dispensing with a stamp. Thus, where a writing when produced in evidence purported to be an agreement for the sale of two flies (carriages) "at £60, the sum of £5 to be paid down, and the remainder of the money at three months from the date, harness and *goodwill* included in the above agreement;" it was held that as this was an entire contract for the sale of the goodwill of the business as well as of the chattels specified, it could not be received in evidence without a stamp (*South v. Finch*, 4 Scott, 293; S.C. 3 Bing. N.C. 506). This decision has been supported and made the foundation of a case which, as it is a sort of leading case on the subject, deserves to be here noted. In the case thus referred to, it appeared that the defendant directed the plaintiff, who was possessed of a patent for furnaces, to send him "a license to use two of his patent furnaces, to be applied to, &c., for £21 as agreed, the engineers or furnace-builders' time to superintend or fix the above order to be paid six shillings a day." Held, first, that this was an agreement within the provisions of the Stamp Act, 55 Geo. 3, c. 184. Held, secondly, that it was an agreement for the purchase of the license to be used for the purposes agreed upon. Held, thirdly, that if it were for the purchase of the furnaces instead of the license, the price of the furnaces was properly sued for, under the count for work and labour in setting them up, and not under a count for the sale of goods and chattels; and, therefore, that the agreement for such purchase was not an agreement for the price of goods, wares, and merchandises; and, therefore, not within the exemption of the Stamp Act; and, consequently, that the agreement could not be given in evidence unless it were stamped (*Chanter v. Dickinson*, 2 Dowl. N. S. 838; S.C. 6 Scott, N. R. 182; 7 Jur. 89). Tindal, C.J., in his judgment, said: "Then the next question is, does the thing sold here come under the denomination of goods, wares, and merchandises? Part of the stipulation is that the defendant should have a license, and the words are "As a patent right," and I cannot see why those words are left in, unless the defendant was to use this as a patent right. There does not appear to have been any specific license sent, but then another direction is, that the patentee shall send the furnaces; in that case the defendant does not want any formal license. I think, therefore, that this was a purchase of an article with a license to use it. Then I think again that the article sold is not goods, wares, and merchandises; it is not an order or agreement for some small article to be removed again; but it evidently means that the thing agreed

for is to be a fixture, and not something ready made. By a note at the bottom of the document it appears that the furnace builder's time is to be paid for at 6s. a-day. This shows that the work itself is a work of some little labour, and not performed instantane-ly. I think, therefore that it is an agreement, not for goods, wares, and merchandise, but both for work to be done on the premises for a stipulated sum, and also that the buyer may use the apparatus as purchased from the patentee. It is, therefore, within the case of *South v. Finch* (3 Bing. N.C., 506) of the sale of goods and good will."

Fixtures.—As we have already seen (*ante*, p. 421) fixtures are not goods and chattels within the meaning of sec. 17 of the Statute of Frauds, and it has accordingly been determined that contracts or agreements respecting fixtures, whether relating to their erection or the sale or purchase of them, are not within the exemption in the 55 Geo. 3, c. 184, and they must therefore be stamped as a conveyance (*Chanter v. Dickinson*, 6 Scott, R.N. 182; *Horsfall v. Key*, 17 Law Journ., N.S., Exch. 266; S.C. 2 Exch. Rep. 778). In this last case it was held that the words "fixtures" means the right of severance of chattels attached to the soil, but not part of the freehold, and that, therefore, a transfer of fixtures is, at least, a transfer of the right of severance; and whether a memorandum of the sale of fixtures transfers any interest in the chattels themselves or not, such transfer is a conveyance within the words of the Stamp Act, which include the "transfer of any right," and as fixtures are not goods, wares, and merchandise, it is not within the exemption. We may just mention that in the late case of *Wiltshier v. Cottrell* (17 Jurist, 758), which is a very important one as to fixtures, the Court of Queen's Bench, referring to and adopting the language of Parke B. in the case of *Sheen v. Rickie* (5 Mees. and Wels. 175), observed that the word "fixtures," though properly applicable to something annexed to the freehold, is sometimes used in a larger sense.

Executory contracts—Statute of Frauds' Extension Act.—At one time the courts held that executory contracts for the sale of goods, that is to say, contracts for the sale of goods *not in esse* or not in a finished condition, were not within the exemption in the Stamp Act, and that, therefore, agreements concerning them must be stamped (see *Buxton v. Bedall*, 3 East, 303; *Waddington v. Bristow*, 2 Bos. and Pull. 452). But in later cases the courts have decided that executory contracts relating to things *not in esse* or not in a state for immediate delivery are within the exemption, and do not require to be stamped. And they have even gone to the extent of declaring that agreements relating to the sale of goods, though not of any particular goods but such as are thereafter to be procured, are

exempt from stamp duty (see the authorities mentioned in *Pinner v. Arnold*, 2 Cr. Mees. and Rosc. 613). It is, however, to be observed that in a comparatively recent case (*De Fries v. Littlewood*, 9 Jur. 988) some of the judges merely allude to doubts having been thrown on *Buxton v. Bedall*, and do not appear to have thought the matter fully settled. In the case above referred to Mr. Justice Patteson said that the non-existence of the goods at the time of the contract between the parties did not render a stamp necessary, and Mr. Justice Williams said, "If the case of *Buxton v. Bedall* (3 East, 303) means to say that the goods bargained for must exist at the time of the bargain, it goes a great way, and the subsequent cases have thrown some doubt upon it. In the instances put by Gibbs, C.J., in *Wilks v. Atkinson* (6 Taunt. 11), where it was decided that an agreement for selling and delivering oil not yet expressed from seed in the vendor's possession was exempt from stamp duty, the goods did not exist in specie at the time of the contract. So in the instance of an order for a suit of clothes, if the cloth was not in the shop of the tailor, or even if it was not manufactured, neither of these circumstances would, as it appears to me, make the contract not a contract relating to goods sold and delivered within the [exemption of the] Stamp Act." In addition it is to be observed that Lord Tenterden's Act, the 9 George 4, c. 14, which, as we have seen (v. 5, p. 562), extends the provisions of the 17th sec. of the Statute of Frauds to agreements or contracts for the future manufacture and supply of goods and materials, expressly provides that no memorandum or other writing made necessary by that act shall be deemed to be an agreement within the meaning of any statute relating to the duties of stamps. As to the precise effect of this statute on the doctrine now under consideration, no express decision has, we believe, been reported. It appears to us that the statute has in effect rendered it unnecessary in all cases of the sale of goods to be delivered at a future time to have the contract stamped, and that it is now quite unimportant whether or not the decision in *Buxton v. Bedall* be overruled by the subsequent cases. This, however, is merely our opinion unsupported by any decision or text-book, and as such the reader will receive it with the necessary caution.

Letters.—The proviso in the 55 Geo. 3, c. 184, to the effect that where divers letters are offered in evidence to prove an agreement between the parties who shall have written such letters, it is sufficient if one of such letters be stamped with an agreement stamp, is not confined to letters or agreements between the same parties, or to a correspondence between two parties only. If the letters and documents contain references to each other, or refer to the same subject-matter, and together form only one agreement, it is sufficient if any one of such letters, by whomsoever written, is stamped with

an agreement stamp (*Drant v. Brown*, 3 Barn. and Cres. 665; *Grant v. Maddox*, 15 Law Journ., N.S., Exch. 104; *Peate v. Dicken*, 1 Cr. Mees. and R. 425). But if the letters and documents do not refer to each other, or to the same subject-matter, so as to form on the face of them, when placed in juxta-position, one entire transaction and one contract, they cannot be given in evidence under one stamp, for there must in general, as will be hereafter shown, be distinct stamps for each distinct contract or transaction (*Atherstone v. Bos- tock*, 2 Scott, N. R. 637).

Letters between merchants and traders passing by post.—Another ground of exemption from stamp duty, before referred to, is that of "letters containing any agreement (not before exempted) in respect of any merchandise or evidence of such an agreement, which shall pass by the post between merchants or other persons carrying on trade or commerce in Great Britain, and residing and actually being at the time of sending such letters at the distance of fifty miles from each other." The only question which this exemption has given rise to was discussed in *Mackenzie v. Banks*, where it was decided that the exemption is not confined to persons carrying on business on their own account, but is extended to persons who, though not traders themselves, are carrying on business for persons who are, provided the letter is written on account of that trade. A son who had managed his mother's trade for her wrote to a creditor of her's *personally*, undertaking to pay her debt, which was contracted in the way of business; the letter was held to be within the exemption (*Mackenzie v. Banks*, 1793, 5 Term Rep. 178).

WORKS FOR LAW STUDENTS.

It will be in the recollection of some of our readers that formerly there was another publication brought out in connection with the present, entitled "*THE LAW STUDENTS' LIBRARY*," and that the same was suddenly discontinued on account of the then unsettled state of the bankruptcy law, a work on which was just then commenced. Since that period many circumstances have prevented the resumption of the publication, but at last we are in a position to recommence on a plan which must, we are certain, be more satisfactory to Subscribers.

The former Works were chiefly devoted to Common Law and Equity, but the Examiners having now made CONVEYANCING an indispensable branch of the examination, it is necessary to allot more

space to Real Property Law, and we therefore propose to issue three works on that branch of learning, which will, we think, be of very great assistance to students, and also be useful in practice. The works will be, first, *LITTLETON'S TENURES*. This will be a *second* edition, our former edition having very long ago become exhausted. It will be completed in two parts, containing about 320 pages. The second work will be *AN ABRIDGMENT OF COKE UPON LITTLETON*, or rather an expurgated edition, freed from the obsolete matter. This will be complete in four parts. The third work will be *LEADING CASES FROM COKE'S REPORTS RELATING TO CONVEYANCING*. This will be complete in four parts. The works on Common Law and Equity will be hereafter announced.

The plan of editing these works will be that applied to our first edition of Littleton, and so much approved, viz., the omission of the purely obsolete matter, and the insertion of explanatory notes containing the recent statutes and decisions. Thus far the plan is similar to the old one, but we have now to announce some very decided improvements; for, in the first place, instead of issuing the work in numbers to pass by the post as a newspaper (which spoiled the appearance of the work) a part will be published every *alternate* month (making six parts in the year), containing 160 pages, which will pass by the post without injury, or being defaced by a stamp. The price of each part will be 4s. 6d., for which it will be sent per post, *free*. In the next place, it has been determined to insert "*QUESTIONS*" on the contents of each work at the end of each complete volume. These questions, to be useful, must be copious and be carefully framed, but they will not be any additional expense to subscribers.

The great satisfaction and approbation expressed by the subscribers to the previous works, induce us to think that the present publications will, with the improvements above referred to, be yet more useful to students, and at least obtain as much support as formerly.

These works will serve for more thoroughly grounding the student than our *KEYS TO THE EXAMINATION QUESTIONS* can be expected to do, and they will not, we think, be less useful than those works in preparing for the actual examinations, as well as for the proposed voluntary examinations. We may be allowed to mention, as showing that our experience in producing what is serviceable to the articled clerk entitles us to some confidence, that almost all the questions at the examinations can be, and indeed are, answered from our "*KEYS*," and that has been the reason why those works have been in such great demand, and we think we may confidently predict that the present series of works will not be less useful to the clerk, whilst they will also be found of assistance in

actual practice. The main object of the series will be to ground the student in the "*principles*," or primary rules of the law, and for such purpose no works can be possibly better fitted than those abovementioned. The study of them must necessarily be useful, and is certainly well calculated to form a legal character of a superior order, provided only that the student has diligence enough to fully master what is placed before him. One great advantage of the above series of works will be, that whilst founded on such undoubted authorities as Littleton and Coke, they will contain nothing requiring to be unlearned, but much that has not heretofore been presented to the profession in so convenient a form, and which has consequently been neglected by modern lawyers, though it was from such materials that the really sound lawyers of the past generation were formed.

In conclusion, we beg to state that the publication will not be commenced until at least 300 orders are received, and as it is desirable to commence operations as soon as possible, we shall thank those of our subscribers who intend to take the work to send up their orders for it IMMEDIATELY, and then we will issue the first part without delay. In fact, it rests with our readers to say whether the publication is to appear at all, and if so, then at what period. Delay on their parts may be fatal to the plan, as we cannot keep the matter open very long. We hope to be able to report progress in our next number.

Those gentlemen who may not have received a printed circular, or have mislaid the same, can send up a *written order* in the following, or similar terms: "Be pleased to put down my name as a subscriber to the LAW STUDENT'S LIBRARY, commencing with Part I., and to forward the same to me until countermanded."

DEBATING SOCIETIES.

BIRMINGHAM LAW STUDENTS' SOCIETY.

Wednesday Evening, Nov. 23rd, 1853.—Moot Point, No. 139. Can a contract be good in any country which is void by the law of the place where it is made, because it wants the solemnities required by that law? (*Alves v. Hodgson*, 7 T. R. 237; *Clegg v. Levy*, 3 Camp. 166; *James v. Catherwood*, 3 D. and R. 190; *Wynne v. Jackson*, 2 Russ. 351; *L. J.* 1827; *Ch. 55*; *Story on Bills*, sec. 137; *Chitty on Bills*, 8th edit., p. 143, note; *Chitty on Com. and Manuf.* ch. 2, p. 166). Decided in the negative.

Wednesday Evening, Dec. 7, 1853.—Moot Point, No 140. A. enters into an agreement with B. to grant a lease. B. refuses to accept the lease unless A. shows his title to grant it. Can A. maintain an action for damages without showing his title, the agreement being silent on the subject? (*Gwillim v. Stone*, 3 Taunt. 433; *Temple v. Brown*, 6 Taunt. 60; *Souter v. Drake*, 3 N. and M. 40; 5 B. and Ad. 992; L. J. 1834, K. B. 31; *Hall v. Betty*, 4 M. and G. 410; L. J. 1842, C. P. 256).

It is not a little strange that a point of such great practical importance as the above should be yet an open question, but the following summary of the arguments on each side will show that, although there appears to have been no express decision upon the point, there is very little doubt what the decision of a court of law would be should the question ever arise. In the affirmative, *Gwillim v. Stone* (cited and approved in *Temple v. Brown*) was much relied upon, for although the decision in that case was merely that a lessee could not recover, as damages, moneys which he had laid out upon the premises before lease granted, yet there are dicta of Gibbs, C. J., Lawrence, J., and Chambre, J., that a person agreeing to grant a lease does not implicitly engage to produce his title. It has been said that these dicta are opposed to the dictum of Lord Mansfield in *Keech v. Hall*, Doug. 21; but, as observed by the court in *Temple v. Brown*, Lord Mansfield was simply stating the precaution which a lessee might take, and not deciding on his legal right.

In the negative, the authority of *Gwillim v. Stone* was not denied, but it was argued that when that case was decided it was the doctrine of the courts, both of law and equity, that a purchaser had no right to call for the lessor's title. In the year 1821, however, after an elaborate argument, Richards, C.B. (sitting in equity) decided (after a consultation with Lord Eldon), that, by contracting for the sale of leasehold property, a person impliedly binds himself to show the lessor's title (*Purvis v. Rayer*, 9 Price, 488); and the Court of King's Bench, in *Souter v. Drake*, where all the authorities are examined, imported the same doctrine into courts of common law. Thus, the doctrine, in case of a sale of leaseholds, that the vendor is obliged to produce the lessor's title, was formerly denied at law and in equity, then admitted in equity, and finally at law. Now, in *Fildes v. Hooker* (2 Mer. 424) Sir W. Grant decided that a lessor could not enforce specific performance of an agreement to take a lease without producing his title to grant it. The decisions do not appear to have gone further than that point, but it is reasonable to conclude that, should the point arise, courts of law will follow the equitable doctrine in the case of an agreement to grant a lease, as they have done in the case of a contract for the sale of leaseholds. No substantial distinction can ultimately be made

between the two cases ; a lessee is a purchaser *pro tanto*, and if he is not at law empowered to ask for his lessor's title, it is unjust to compel him to furnish it to his assignee. The point was decided in the negative.

FRANCIS SANDERS, Cor. Sec.

30, Waterloo-street, December 14.

MUTUAL CORRESPONDENCE.

List of Correspondents.

The following is a corrected list of correspondents on Moot Points :—Mr. T. R. Addison, of Soham, Cambridgeshire ; Mr. S. Arbouin, at Messrs. Few and Co.'s, Henrietta-street, Covent-garden, London ; Mr. Charles Ball, Chester ; Mr. H. F. Barnet, of Walsall, Staffordshire ; Mr. A. Beale, No. 164, Friar-street, Reading ; Mr. J. Bassett, at R. Prall's, Esq., Rochester ; Mr. J. Beaumont, at Messrs. Stevens and Satchell, solicitors, 6, Queen-street, Cheapside ; Mr. C. G. H. Beck (corresponding secretary to the Worcester Law Students' Society), Spring Hill, Worcester ; Mr. J. B. Betts, at Messrs. Mercer and Edwards, solicitors, Deal ; Mr. C. Bishop, jun., of Llandoverly ; Mr. J. Booth, at H. J. Marshall's Esq., 21, Market-place, Durham ; Mr. W. Brice, Bruton, Somersetshire ; Mr. B. P. Broomhead, of No. 17, North Church-street, Sheffield ; Mr. J. S. Brown, of Thorp Villa, Norwich ; Mr. John Clayton, jun., White Cotes, Chesterfield ; Mr. W. Clayton, of Hady House, Chesterfield ; Mr. J. Cook, of Witham ; Mr. L. Cordes, Messrs. Prothero, Towgood, and Fox, Newport, Monmouthshire ; Mr. F. J. Davis, of Tygwynne, near Cardigan ; Mr. J. W. S. Dix, of No. 3, Small-street, Bristol ; Mr. H. Druce, at C. J. Jones', Esq., No. 1, Gray's-inn-square, London ; Mr. F. T. Dubois, of St. Michael's-churchyard, Derby ; Mr. C. C. Ellis, Castle-street, Ruthin, North Wales ; Mr. C. Fairer, of Appleby ; Mr. H. S. Ferns, No. 11, James-row, Sheffield ; Mr. R. S. Freame, Gillingham, Dorsetshire ; Mr. G. Gale, No. 2, Bowling-lane, Hull ; Mr. F. F. Goe, jun. of Louth ; Mr. T. Gould, of Uttoxeter ; Mr. J. Green, jun., at J. A. Busfield's, Esq., Bradford, Yorkshire ; Mr. H. Hall, at L. Richmond's, Esq., Ashton-under-Lyne ; Mr. J. J. Handley, Leeming street, Mansfield ; Mr. J. Hartley, at R. Hunt's, Esq., Rochdale ; Mr. J. F. Heywood, at J. Gaskell's, Esq., Bolton-le-Moors ; Mr. R. W. Hillman, at W. M. Bennett's, Esq., No. 2, Raymond-buildings, Gray's-inn, London ; Mr. J. Homer, at J. Homfray's, Esq., Halesowen, Worcestershire ; Mr. T. J. Hooper, No. 90,

Ebury-street, Eaton-square, London : Mr. E. J. Howell, No. 4, Upper Larkhall Rise, Larkhall-Lane, Clapham ; Mr. Josiah Jones, of No. 10, Corn Market, Worcester ; Mr. H. Kinneir, of Barnfield House, Southernhay, Exeter ; Mr. H. Lloyd, Chester ; Mr. J. Lowes, at Messrs. Chater's, Newcastle-upon-Tyne ; Mr. P. W. Lovett, of Chertsey ; Mr. W. Mann, 45, Princess-street, Manchester ; Mr. W. Marshall, J. Brook's, Esq., Ashton-under-Lyne ; Mr. J. Maysey, at T. Smith's, Esq., Gloucester ; Mr. W. M. Miller, Surrey-street, Norwich ; Mr. H. Morris, of Llanelly ; Mr. J. N. Mourilyan, jun., of Sandwich, Kent ; Mr. H. Murray, at H. Radcliff's, Esq., Oldham, Lancashire ; Mr. G. G. Norris, at A. Parson's, Esq., St. James-street, Nottingham ; Mr. A. Owen, at E. L. Hesp's, Esq., Huddersfield ; Mr. R. Parry, County Court office, Carnarvon, North Wales ; Mr. W. T. Pears, of Warrington ; Mr. W. F. Pratt, Wootton Bassett, Wilts ; Mr. J. Plews, of Masham, near Bedale, Yorkshire ; Mr. G. W. Powell, at Messrs. D. Thomas and Banks', Brecon ; Mr. T. S. Preston, the Manor House, Hinckley, Leicestershire ; Mr. T. F. Richards, at J. Fluker's, Esq., No. 10, Symonds-inn, Chancery-lane, London ; Mr. T. V. Roberts, of No. 2, Lower Calthorpe-street, Mecklenburg-square, London ; Mr. E. Robinson, at Messrs. J. and D. Russell's, York ; Mr. S. W. Rowse, at S. Rowse's, Esq., 23, Princess-street, Plymouth ; Mr. T. Sampson, No. 78, Lowgate, Hull ; Mr. F. Sanders (corresponding secretary of the Birmingham Law Students' Society), No. 30, Waterloo-street, Birmingham ; Mr. J. Sims, of Harleston, Norfolk ; Mr. G. P. Slade, of Yeovil ; Mr. W. Small, of Bladon Castle, Burton-on-Trent ; Mr. J. W. Smith, 2 Woodville-terrace, Gravesend ; Mr. S. Smith, at J. Walker's, Esq., Chester ; Mr. W. Stevens, of Sherborne ; Mr. F. Summers, 12, Parliament-street, Hull ; Mr. R. Sutcliffe, Brownhill, near Burnley, Lancashire ; Mr. J. Tree, 2, High-street, Worcester ; Mr. R. Ward, of 43, Noel-street, River-street, Islington, London ; Mr. H. S. Watts, of Yeovil ; Mr. James Wells, at C. G. Brown's, Esq., Bilston, Staffordshire.

We trust we shall have in our next number to report a large addition to the above names, as at present the number is very small, compared with the large body of articled clerks in town and country.

QUESTIONS AND ANSWERS
ON THE
NEW EQUITY PRACTICE.

[Continued from Vol. V., N.S., p. 685.]

*Answers—Impertinence—Production of Documents by Defendant—
Production of Documents by Plaintiff—Interrogatories for the
Examination of the Plaintiff—Motion for Decree—Joining Issue—
Replication—Evidence.*

ANSWER.

What provisions have been lately made with respect to the form and contents of an answer?

The answer must be divided into paragraphs numbered consecutively, each paragraph containing as nearly as may be a separate and distinct statement or allegation. Besides the answer to the plaintiff's filed interrogatories, the answer may contain such material statements as the defendant may think it necessary or advisable to set forth therein (c. 86, s. 14).

Can a defendant put in an answer before the filing of interrogatories?

A defendant may if he please, within twelve days from appearance, plead, answer, or demur to the bill, and even after that time upon leave obtained. But a defendant cannot be *compelled* to answer until after the filing and delivery of interrogatories (c. 86, s. 13; Ord. of 8th May, 1845, pl. 16, *art.* 16).

What time has a defendant, from whom an answer is required, to put in his answer?

Fourteen days from the delivery to him, or his solicitor, of a copy of the interrogatories which he is required to answer. The time may, however, be enlarged on application being made for that purpose (Ord. of 7th Aug. 1852, pl. 19).

What time has a defendant to demur to a bill?

Where a defendant demurs and also answers, he has the same time as in the case of an answer. If he demurs alone he must do so within twelve days after appearing (Ord. of May, 1845, pl. 16, *art.* 10; Pract. Equity, 170).

How is time to answer a bill obtained, and from whom?

By application to a judge at chambers, by summons issued by the judge's clerks. In special cases application might, it is conceived,

be made to the court (c. 86, s. 13 ; c. 80, ss. 13, 35, 36, 37 ; Ord. of 16th Oct. 1852, pl. 58).

Does a commission now issue for taking an answer or plea within the jurisdiction, or how is the same taken ?

Commissions for taking pleas, answers, disclaimers, and examinations within the jurisdiction, are not now required ; the plea, answer, disclaimer, or examination may be filed after it is sworn to, like an affidavit (c. 86, s. 21).

NOTE.—In the case of an infant defendant within the jurisdiction, a guardian *ad litem* may, on the application of the plaintiff, be appointed without a commission on an affidavit of the fitness of the proposed guardian (*Egremont v. Egremont*, 20 Law Tim. 122 ; see the former decisions and the practice stated in *Pract. Equity*, p. 207).

How are pleas and answers sworn and taken out of the jurisdiction of the court, but within the dominions of the Queen ?

Before any judge, court, notary public, or person lawfully authorised to administer oaths in the country, colony, island, plantation, or place respectively, where such pleas or answers are taken (c. 26, s. 22 ; 17 Jur. 170).

How are pleas and answers sworn and taken in foreign parts out of the Queen's dominions ?

Before any of her Majesty's consuls or vice-consuls (c. 86, s. 22).

Is the oath of the messenger now required on the filing of an answer, &c. ?

No, whether the answer have or not been taken by commission, *i.e.*, whether taken within or without the jurisdiction of the court (c. 86, s. 25 ; 20 Law Tim. Rep. 256).

How are alterations made in answers prior to their being sworn to be authenticated ?

By the commissioner or other party before whom the answer, &c., is taken, inserting the initials of his name in the margin opposite the alterations (c. 86, s. 25 ; Hem. 28).

IMPERTINENCE.

Can exceptions be taken to bills, answers, &c., on account of their containing impertinent matter ?

No ; but the court may direct the costs occasioned by any impertinent matter introduced into any proceeding to be paid by the party introducing the same. This will be done when the court disposes of the costs of the cause or matter (c. 86, s. 17 ; Ord. of 7th Aug. 1852, pl. 30).

NOTE.—Formerly exceptions for impertinence in bills and answers, and even in affidavits, were not uncommon. Impertinence was where the pleadings or affidavits were stuffed with long recitals or with long digressions of matters of fact, which were altogether un-

necessary and totally immaterial to the point in question. There was a great difficulty in many cases in saying what was impertinent. It was formerly considered that if an instrument was required to be set forth by the bill, it was not impertinent to set forth the whole of it; for if a defendant took upon himself to state only the substantive part of the instrument, and an exception was taken because he had not set forth the substantial part, the court would have been unable to decide what was the substantial part. Even formerly it was held that a defendant was not bound to confine himself to an answer to the interrogatories in the bill, but might state circumstances in his defence. But if what was stated was immaterial, it was held to be impertinent; and by 16th Ord. of May, 1845, if the defendant answers any statement or charge in the bill only by stating his ignorance of the matter so stated or charged, such answer will be deemed impertinent. These examples will suffice to give an idea of what is considered to be impertinent. It is to be remarked that nothing in the new statute presents exceptions for *scandal*, as to which we may observe that scandal is defined to be anything alleged in a bill, answer, or affidavit in language which it is unbecoming the court to hear, or contrary to good manners, or anything set forth charging a person with a crime not necessary to be shown in the cause (*Pract. Equity*, pp. 230—232).

PRODUCTION OF DOCUMENTS BY DEFENDANT.

[There are provisions in the 15 & 16 Vict. c. 86, for the more readily obtaining the production (*on oath*) of documents in the possession of a party to the suit, including the case of a claim. The production may be obtained at the instance of a plaintiff or a defendant. We first notice the case of a plaintiff requiring a defendant to produce documents.]

Can a plaintiff obtain the production of any and what documents in the possession of the defendant?

Yes, of such documents in the defendant's possession or power relating to the matters in question in the suit, as the court or judge shall think right (c. 86, s. 18).

In what suits may the defendant be required to produce documents?

In any suit, whether commenced by bill or by claim, and as to a suit commenced by bill, whether the defendant has or has not been required to answer the bill, or has or has not been interrogated as to the possession of documents (c. 86, s. 18).

NOTE.—A plaintiff is before answer entitled to production, and delay in making the application does not deprive him of such right (*Rochdale Canal Co. v. King*, 9 Hare, Append. 49, note).

Where are the documents to be left or deposited?

Where no special direction is made, the documents must be left

or deposited in the Record and Writ Office (Ord. of 16th Oct. 1852, pl. 57). This applies also to cases of production ordered at the instance of a defendant.

How are the documents when produced to be dealt with ?

In such manner as shall appear to the court or judge to be just (c. 86, s. 18 ; Ord. of 16th Oct. 1852, pl. 57).

NOTE.—This provision is one of some practical importance, for formerly, unless the parties otherwise agreed, the only order the court made was to direct the documents to be brought into court (Hem. 20). The above provision also applies where the plaintiff is, at the defendant's instance, required to produce documents.

PRODUCTION OF DOCUMENTS BY PLAINTIFF.

Can a defendant obtain the production of any and what documents in the possession of the plaintiff ?

Yes, of such documents in the plaintiff's possession or power relating to the matters in question in the suit, as the court or a judge shall think right (c. 86, s. 20 ; Ord. of 16th Oct. 1852, pl. 57).

NOTE.—It is probable that it was intended by the above 20th sec. to give power to a defendant to enforce discovery of what documents the plaintiff had, without filing a cross-bill, but it seems that the language of the section is not sufficiently large for such a purpose (*Mc Intosh v. Great West. Rail. Co.*, 16 Jur. 989 ; 16 Jur. pt. 2, p. 406).

In what suits and at what stage thereof may the plaintiff be required to produce documents ?

In any suit, whether commenced by bill or by claim, but as to suits commenced by bill where the defendant is required to answer the plaintiff's bill, not till after he has put in a full and sufficient answer to the bill, unless the court shall make any order to the contrary (c. 86, s. 20).

To whom must the application for production of documents be made ?

In ordinary cases, it should be made in the first instance at chambers (*Thompson v. Teuton*, 16 Jur. 899 ; *S. C. 9 Hare*, Append. 49). In the case of *Sergison v. Livingstone* (17 Jur. 33), which was an unopposed motion by a defendant for the production by the plaintiff of documents, V.C. Kindersley said : "The practice is, in the first place, to make a formal affidavit, and make an application to the judge in chambers, before which it cannot be ascertained whether the application ought to be made in chambers or in open court."

Where an application is made to the court for production of documents, what is required ?

That the party applying should give a notice of motion specifying therein the documents required to be produced. Such, at least, was

the decision in *Fiott v. Mullins* (16 Jur. 946), but it should seem that the courts do not strictly adhere to this practice. It is also said in some of the cases that the applicant must make an affidavit in support of his application (17 Jur. 33; *Mc Intosh v. Great West. Rail. Co.* 16 Jur. 989). But in the case of *Rochdale Canal Co. v. King* (9 Hare, Append. 49), it was decided that no affidavit is necessary to support the application, whether made by the plaintiff or the defendant.

What must the defendant do in order to oppose the application for production?

He should make an affidavit denying in clear terms the possession of documents, or, if he have any, stating what they are, and denying possession of others. The court has settled a form of affidavit on the model of a carefully-prepared answer, which, though not obligatory, will be considered satisfactory (see *Rochdale Canal Co. v. King*, 9 Hare, Append. 49, note).

INTERROGATORIES FOR THE EXAMINATION OF THE PLAINTIFF.

[Where a defendant to a suit required discovery from the plaintiff either concerning matters of fact or the contents of documents relating to their differences, he must, formerly, have filed a *cross-bill*. The 15 & 16 Vict. c. 86, s. 19, seeks to prevent the necessity for such a bill in most instances, as we shall presently see.]

Can the defendant in any and what suits file interrogatories for the examination of the plaintiff in the suit?

He may file such interrogatories in any suit, whether commenced by bill or by claim (c. 86, s. 19).

What statement is to be prefixed to the interrogatories?

A concise statement of the subjects on which a discovery is sought (c. 86, s. 19).

At what time may a defendant to a suit file such interrogatories?

In the case of a bill which the defendant is required to answer, he cannot file interrogatories until after he has put in a *sufficient* answer to the bill. No time is fixed where the defendant is not required to answer, nor in the case of a claim (c. 86, s. 19).

NOTE.—An answer is not considered sufficient, though not excepted to, until *six* weeks after the filing thereof, from which the vacations are excluded (Hem. 22). In the case of *Sibbald v. Laurie* (20 Law Tim. 320), although the time for taking exceptions to an answer had not expired, leave was given to the defendant, who had put it in, to file interrogatories for the examination of the plaintiff, but at the risk, if the answer turned out to be insufficient, of having the interrogatories taken off the file, with costs.

With whom are the interrogatories to be filed, and how served?

The interrogatories are to be filed with the clerks of Records and

Writs, and a copy thereof is to be delivered to the plaintiff or to his solicitor (c. 86, s. 19).

What provision is made as to the plaintiff's answering such interrogatories?

The plaintiff is to answer the interrogatories in like manner as if they had been contained in a bill of discovery filed by the defendant against him on the day when such interrogatories were filed, and as if the defendant to such bill of discovery had on the same day duly appeared (c. 86, s. 19).

What is said in the statute as to exceptions to answers to such interrogatories?

That the practice of the court with reference to excepting to answers for insufficiency or for scandal, shall extend and be applicable to answers put in to such interrogatories (c. 86, s. 19).

What provisions are made as to the determination of the materiality or relevancy of any answer to such interrogatories or exceptions to such answer?

In determining the materiality or relevancy of any answer to the interrogatories or of any exceptions thereto, the court is to have regard, in suits commenced by bill, to the statements contained in the original bill, and in the answer which may have been put in thereto by the defendant exhibiting such interrogatories for the examination of the plaintiff, and in suits commenced by claim, to the statements therein, and in any affidavits which may have been filed either in support thereof or in opposition thereto (c. 56, s. 19).

Is the defendant precluded from filing a cross-bill?

No; for the statute expressly provides that the defendant, if he shall think fit so to do, may exhibit a cross-bill of discovery against the plaintiff, instead of filing interrogatories for his examination (c. 86, s. 19).

MOTION FOR DECREE.

Is there any and what course which a plaintiff may adopt to bring a cause to hearing without filing a replication?

A plaintiff in a *bill* is now enabled to move for a decree or decretal order, without filing a replication, and whether or not the defendant has answered the bill (c. 86, s. 15; Ord. of 7th Aug. 1852, pl. 22—26). This hearing is by motion (according to the words of the statute, though not so deemed for all purposes), and may expedite a cause in the cases in which it is proper to be adopted, but the month's notice which, as we shall presently see, is required, is rather long. And it is to be observed that, though called a motion, the courts will not allow it to be called on as such, but require each case to be set down in the cause list, but the matter may, of course, be brought on as a short cause, in a proper case (*Drew v. Long*, 17 Jur. 173).

In what case and at what stage of the suit may the plaintiff move for a decree or decretal order ?

In the case of a bill, and at any time after the period allowed to the defendant for answering has expired, and before the replication is filed (c. 86, s. 15). This provision is not, as might seem from the language of the statute, confined to the cases of plaintiffs who have filed interrogatories, or of defendants having voluntarily answered without being required, but also extends to the case of a defendant not required to answer, and who has not put in an answer, for the Ord. of 7th Aug. 1852, pl. 29, expressly recognises the right of a plaintiff to move for a decree though he has not required the defendant to answer, and the defendant has not answered the bill (*Hem. Eq. Stats.* 16, 17). By s. 13 of the 15 & 16 Vic. c. 86, where the defendant obtains further time for pleading, answering, or demurring to the bill, the plaintiff's right to move for a decree or decretal order is to be suspended in the meantime. It will be observed that the notice of motion is to be given before the filing of a replication, and leave will not be given to file a replication after the giving of such a notice and the hearing of the motion; the plaintiff should await the result of the motion (*Duffield v. Sturges*, 20 Law Tim. 205).

What notice of motion for a decree must be given ?

One month's notice (Ord. of 7th Aug. 1852, pl. 22).

NOTE.—At the time of giving the notice the plaintiff should enter the cause with the registrar of the court, and it will then be unnecessary to give any further notice of setting it down (*Boyd v. Jaggard*, 17 Jur. 655 ; 21 Law Tim. 234).

What evidence may be given on the hearing of such motion ?

Affidavits by or on behalf of either party ; where the motion is made after an answer is put in, such answer will, for the purposes of the motion for the decree, be treated as an affidavit (c. 86, s. 15).

NOTE.—No notice of the plaintiff's intention to read the defendant's answer is necessary (*Cousins v. Vaysey*, 20 Law Tim. 305). A defendant cannot, under any circumstances, read a co-defendant's answer on a motion for a decree (*Ibid*). It has, however, been held that a defendant may, by leave on such a motion, read his own answer, he submitting to cross-examination (*Howell v. Williams*, 20 Law Tim. 274).

When must the plaintiff's affidavits be filed, and what provision is made for informing the defendant thereof ?

The plaintiff's affidavits must be filed before the service of the notice of motion. A list of the affidavits must be set forth at the foot of such notice (Ord. of 7th Aug. 1852, pl. 23).

NOTE.—No affidavits but those of which notice has been given

can be used without leave obtained at the hearing (*Cousins v. Vaysey*, 20 Law Tim. 305).

Within what time must the defendant file his affidavits in answer to the defendant's.

Within fourteen days after the service of the notice of motion. A list thereof must be furnished (Ord. of 7th Aug. 1852, pl. 24).

Within what time must the plaintiff file his affidavits in reply?

Within seven days after the fourteen days from the service of the notice of motion, i.e., within three weeks from such notice. A list is to be furnished to the defendant. The rule does not say within seven days after the filing of the defendant's affidavit, so that there is no inducement to a defendant to be earlier than the fourteen days allowed him, but rather the contrary (Ord. of 7th Aug. 1853, pl. 25).

To what matters must the affidavits of the plaintiff in reply be confined?

Strictly to matters in reply, and except so far as they are in reply they are not to be regarded by the court, unless upon the hearing of the motion the court shall give leave to the defendant to answer them, and in that case the costs of such affidavits, and of the further affidavits consequent upon them, are to be paid by the plaintiff, unless otherwise ordered (Ord. of 7th Aug. 1852, pl. 25).

May further evidence than the preceding be used on either side upon such motion?

Not without leave of the court (Ord. of 7th Aug. 1852, pl. 26).

What provisions are made as to the entering and hearing of such motions for decree?

Every notice of motion for a decree or decretal order is to be entered with the registrar, who is to make out a list of such motions, and the same are to be heard according to such list, unless the court otherwise orders (Ord. of 7th Aug. 1852, pl. 27).

JOINING ISSUE—REPLICATION.

How is issue joined?

By filing a replication in the form or to the effect of the replication formerly in use. This applies to the case of a defendant who has put in an answer, and a motion for a decree is not made, or, having been made, is refused, as also to the case of a defendant not required to answer, and who has not answered, the bill (c. 86, s. 26; Ord. of 7th Aug. 1852, pl. 28).

NOTE.—As before stated (p. 23), where a motion is to be made for a decree or decretal order, no replication should be filed (20 Law Tim. 205).

Where a defendant not required to answer, has not answered the bill, what is the effect thereof?

He will be considered to have traversed the case made

by the bill. As we have just seen, in such a case issue is to be joined in the usual way, *i.e.*, by filing a replication in the form or to the effect heretofore in use (c. 86, s. 26 ; Ord. of 7th Aug. 1852, pl. 28).

NOTE.—Where a plaintiff has entered an appearance for an absconding defendant, from whom no answer is required, and who has not answered the bill, notice of filing the replication is to be given in the *Gazette* and two newspapers of the county in which the defendant last resided (*Barton v. Whitcomb*, 17 Jur. 81 ; 20 Law Tim. 214).

DISMISSAL FOR WANT OF PROSECUTION.

At what time may a defendant not required to answer, and who has not answered the bill, move to dismiss the bill ?

After the expiration of three months from appearance, unless in the meantime a motion for a decree or decretal order has been entered with the registrar, or the cause set down to be heard (c. 86, s. 27 ; Ord. of 7th Aug. 1852, pl. 29).

EVIDENCE.

In explanation of the following questions and answers it should be borne in mind that formerly evidence in equity was (with the exception of exhibits) obtained by the examination of witnesses on written interrogatories exhibited to the witnesses either (in town) by the regular examiners of the court, or (in the country) through the medium of commissioners specially appointed for the purpose, the presence thereat of the parties to the suit and their solicitors being strictly prohibited. This exclusion of affidavit evidence (except in the single case of exhibits) and of the presence of the parties and their solicitors at the examination, has been done away with by the new act, which also substitutes for a secret examination on interrogatories an open oral examination before an examiner (sec. 31), though the court may direct the examination of a particular witness to be by interrogatories (sec. 28). But none of the provisions of the act are to apply to pending suits where issue has been joined before the 1st day of Nov. 1852, unless by consent or by leave of the court (Ord. of 7th Aug. 1852, pl. 39 ; see as to this last, *Sherwood v. Vincent*, 9 Hare, Append. 19 ; *Cable v. Cooper*, 9 Hare, Append. 20 ; S. C. 16 Jur. 969 ; *Mackintosh v. Great Western Railway Company*, 9 Hare, Append. 20, note ; 16 Jur. 1012 ; *Booth v. Tomlinson*, 9 Hare, Append. 20, note ; *Hextall v. Cheate*, 9 Hare, Append. 20, note).

Is the mode of examining witnesses on interrogatories now in use in any and what cases ?

Witnesses are not now, as heretofore, examined on interrogatories,

except where the court orders that any particular witness or witnesses within the jurisdiction, or any witness or witnesses out of the jurisdiction, shall be so examined (c. 86, s. 28).

NOTE.—The court will not, on light grounds, order an examination on interrogatories (*per* V.C. Parker in *Cook v. Hall*, *post*).

Is any commission for the examination of witnesses necessary?

Not where the examination is to be within the jurisdiction of the court (c. 86, s. 35).

NOTE.—Nothing is said in the 35th sec. or elsewhere as to a commission for the examination of witnesses *out* of the jurisdiction of the court. Sec. 31 speaks of the appointment of an examiner without reference to the case of witnesses out of the jurisdiction, but there is no doubt an examiner will be appointed for taking the examination of a witness or witnesses out of the jurisdiction. Indeed, by sec. 22, referred to *supra*, p. 18, examinations, declarations, and affidavits may be sworn and taken in Scotland, or Ireland, or the Channel Islands, or in any colony, island, plantation, or place under the dominion of her Majesty in foreign parts, before any judge, court, notary public, or person lawfully authorised to administer oaths there respectively, or before any of her Majesty's consuls, or vice-consuls, in any foreign parts *out* of her Majesty's dominions. Judicial notice is to be taken of their seals or signatures. In cases where such examinations can be had a commission would seem to be unnecessary, it being sufficient to obtain, under sec. 31, a special appointment of an examiner. In the case of *Crofts v. Middleton* (9 Hare, Append. p. 18; S. C. 20 Law Tim. 189; 17 Jur. 112), where a defendant, whose evidence it was desired to take, was resident in Australia, and it was not known whether in Melbourne or Adelaide, two examiners were appointed in each place, each with power to act in default of the first named examiner being capable; and liberty was, in the same order, reserved to the principal defendant in the cause to appoint some person in the colony to attend the taking of the examination on his behalf.

How is evidence now taken in equity?

Either by affidavits or by oral examination before examiners except where, as above stated, it is otherwise ordered (c. 86, s. 29).

NOTE.—In the cases of *claims*, the evidence is confined to affidavits as a general rule; but, as we shall presently see, witnesses may be examined *orally*, though this, in practice, is confined to particular witnesses whom it may be thought important to have orally examined. In the case of an examination of witnesses *de bene esse* (as to which see Pract. Equity, pp. 290, 291), the witnesses are to be examined *orally*, unless, indeed, circumstances can be shown to warrant an examination in the old mode by interrogatories; for the statute having laid down the principle, that as a general rule the

Examination of witnesses is to be *viva voce* (where affidavits are not used) it is not to be dispensed with on light grounds, *i.e.*, interrogatories are not to be resorted to without strong reasons being shown (*per* V.C. Parker, in *Cook v. Hall*, 9 Hare, Append. 20; S. C. 16 Jur. 1008; 20 Law Tim. 152; *per* Turner V.C. S. C. in 20 Law Tim. 202).

How is the evidence to be taken in the absence of any notification by the parties to the suit?

By affidavit (c. 86, ss. 29, 30; Ord. of 7th Aug. 1852, pl. 31).

NOTE.—On a motion for leave to prove the execution of a deed *viva voce*, the court gave leave to prove the execution by affidavit (*Ball. v. Carter*, 9 Hare, Append. 20, note).

Within what time should the plaintiff give notice of his desire to have the evidence taken orally?

Within seven days after issue is joined in a suit commenced by bill (c. 86, s. 29; Ord. of 7th Aug., 1852, pl. 31).

If the plaintiff does not give such notice, or if he gives a notice requiring the evidence to be taken by affidavits, what must the defendant do to entitle him to have the evidence taken orally?

He should within fourteen days after the expiration of the said seven days (*i. e.*, within three weeks after issue joined) give notice to the plaintiff or his solicitor that he desires the evidence to be taken orally (Ord. of 7th Aug. 1852, pl. 31).

If no such notices be given how will the evidence be taken?

By affidavit, which may, therefore, now be considered as the established mode of giving evidence, with an option merely to the parties to have an oral examination (c. 86, s. 29).

Can the evidence be required to be taken orally by any party to the cause?

Yes, provided he be a party substantially interested in the suit; if the evidence be required to be oral merely by a party without a sufficient interest in the matters in question in the suit, the court, upon summary application, may make such order as shall be just (c. 86, s. 30).

May any and what affidavits be used, though the parties have elected to have an oral examination?

Affidavits by particular persons or as to particular facts or circumstances may, by consent, or by leave of the court obtained upon notice, be used on the hearing of the cause, though the parties may have elected to have the evidence taken orally (c. 86, s. 36; see *Crofts v. Middleton*, 9 Hare, Append. 18; S. C. 17 Jur. 112; 20 Law Tim. 189).

Can such consent be given by persons under disability?

Yes, with the approbation of the court (c. 86, s. 36).

Can witnesses be examined orally in the case of claims, motions, petitions, or other matters?

Yes (c. 86, s. 40; Ord. of 7th Aug. 1852, pl. 36, *post*, p. 31).

NOTE.—Though, as before observed (*ante*, p. 22), motions for decrees or decretal orders are for some purposes deemed causes, yet it has been decided that a motion for a decree comes within the above 40th sec. (*Williams v. Williams*, 17 Jur. 434).

May the court require, at the hearing of a bill or claim, the oral examination before itself of any witness or party in the cause?

Yes, and may direct the costs thereof to be paid by such of the parties to the suit or in such manner as it may think fit (c. 86, s. 39).

NOTE.—It has been held by V.C. Wood that owing to the wording of the above 39th sec. the court can only examine the witnesses *who have been examined before*, or who are parties to the claim, and not fresh witnesses (*Wollaston v. Osborn*, 20 Law Tim. 274). And even as to the examination of the parties at the hearing, it is not a strict right in them but matter of discretion in the court (*Oliver v. Wright*, 21 Law Tim. 164; *Wilkinson v. Stringer*, 16 Jur. 1083; as to causes at issue at the time of the passing of the act see 20 Law Tim. 136, and as to causes in the Master's offices, see 20 Law Tim. 139, 189; 17 Jur. 29, 128).

By or before whom and how is the oral examination of a witness conducted?

By or before one of the examiners of the court, or by or before an examiner to be specially appointed by the court. The examination is to take place in the presence of the parties to the suit, their counsel, solicitors, or agents, and is to be conducted as nearly as may be in the mode now in use in courts of common law with respect to a witness about to go abroad, and not expected to be present at the trial of a cause (c. 86, s. 31).

NOTE.—The court will appoint an examiner even in London (17 Jur. 824). It is usual to select a barrister, but the court has appointed a solicitor to take the examination (see *Henderson v. Phillips*, 17 Jur. 615; *Evans v. Bath*, 20 Law Tim. 189). The application for the appointment of an examiner is properly made in court (28 Law Tim. 154).

With what documents is the examiner to be furnished, and by whom?

The plaintiff's solicitor must furnish the examiner with a copy of the bill and of the answer, if any, in the cause (c. 86, s. 31).

How are the depositions of the witnesses to be taken?

They are to be taken down in writing by the examiner, not in general by question and answer, but in the form of a narrative, and when completed are to be read over to the witness, and to be signed

by him in the presence of the parties, but if he refuse to sign the same the examiner may do so. The examiner may, if there should appear any special reason for doing so, put down any particular question or answer (c. 86, s. 32).

Where any particular question is objected to, how is the examiner to proceed?

He is to notice or refer to the same in or upon the depositions, and state his opinion thereon to the counsel, solicitors, or parties, and refer to such statement on the face of the depositions, but he is not to decide upon the materiality or relevancy of any question. The court is to deal with the costs of immaterial or irrelevant depositions as may be just (c. 86, s. 32).

If a witness produced before the examiner refuses to be sworn to answer any lawful question, how is he to be dealt with?

In the same manner as heretofore pursued in the case of a witness produced for examination before an examiner upon interrogatories (c. 86, s. 33).

NOTE.—Where a witness neglects to attend or refuses to be sworn, he may be committed for contempt (*Hennegal v. Evan*, 12 Ves. 201): For this purpose an affidavit of service of the subpoena, and notice must be made and filed, and an office copy obtained, upon which counsel moves, "*That A. B. may be ordered to attend the examiner, at his own expense, in four days, or be committed to the Queen's Prison, and that he may pay the costs of the application.*" The order is drawn up with the registrar, after which a copy of the order must be served upon the witness personally, the original being produced. If the witness neglects to attend at the time stated, or refuses to be sworn, a certificate must be obtained from the examiner of non-attendance, or of the refusal to be sworn, and an affidavit of service of the order made, and upon motion as of course, an order will be granted for the committal of the witness. If a peer or member of Parliament refuses to attend as a witness, he is proceeded against by sequestration. A witness committed, may, *after* he has been examined, and tendered or paid the costs, apply by motion or petition, and production of the certificate of his examination being complete, for his discharge from custody, or he may be discharged by the party at whose instance he was committed, if the gaoler can be prevailed on to take such discharge.

When a witness demurs or objects to any question put to him, what is to be done?

The question or questions so put, and the demurrer or objection of the witness thereto, shall be taken down by the examiner, and be transmitted by him to the record office of the court to be there filed. The validity of such demurrer or objection is to be decided

by the court, and the costs of such demurrer or objection are to be in the discretion of the court (c. 86, s. 33).

When the examination of witnesses before the examiner is concluded, what is to be done with the original depositions?

They are to be transmitted by the examiner, duly authenticated by him, to the record office, to be there filed (c. 86, s. 34).

Can the parties to the suit procure copies of such depositions?

Yes, either of the whole or of any part or portion thereof, upon payment of 4d. per folio (c. 86, s. 34).

How are affidavits to be framed?

Every affidavit must be divided into paragraphs numbered consecutively, each confined to a distinct portion of the subject (c. 86, s. 27).

NOTE.—The Ord. of May, 1845, pl. 126, requiring affidavits to be expressed in the first person of the deponent, is still in force, and thereby a solicitor filing an affidavit not taken or expressed in the first person of the deponent, will not be allowed the costs of preparing and filing such affidavit in taxation of costs (Pract. Equity, pp 476, 477). It may be here usefully mentioned that by the 16 & 17 Vict. c. 78, "Masters Extraordinary in Chancery" are Abolished, and Solicitors appointed to administer Oaths in Chancery are henceforth to be called "Commissioners;" the full style in the country is "Commissioners to Administer Oaths in Chancery in England;" town commissioners prefix the word "London."

What is the period fixed for the closing of evidence?

Nine weeks after issue joined, including cross-examination and re-examination of witnesses orally examined (c. 86, s. 38; Ord. of 7th Aug. 1852, pl. 32).

Can the time be enlarged, and by whom?

The time may be enlarged on application at chambers (c. 80, s. 26).

NOTE.—Formerly this was termed enlarging "publication" (see explanation Pract. Equity, p. 295); but now after the filing of the examinations in the Record Office, any party to the suit may at once have a copy thereof or of any part thereof (c. 86, s. 34, *suprà*), except where taken *de bene esse* (16 Jurist, 1008).

What is the effect of the lapse of the time for closing the evidence?

After the time for closing the evidence has elapsed, no further evidence, whether oral or by affidavit (except by way of cross-examination) is receivable, without special leave of the court previously obtained for that purpose (c. 86, s. 38; Ord. of 7th Aug. 1852, pl. 32).

In what case, and within what further period, may a witness be cross-examined after the closing of the evidence?

In the case of a witness who has made an affidavit to be used by

one of the parties at the hearing, so that such cross-examination is had within one month after the period for closing the evidence, *i.e.*, within one month after nine weeks from the joining of issue (Ord. of 7th Aug. 1852, pl. 32).

What notice of the cross examination of a witness, who has made an affidavit, must be given and to whom?

The party desiring to cross-examine an affidavit-witness must give forty-eight hours' notice of the time and place of such intended cross-examination. The notice must be given to the party filing or intending to use the affidavit (Ord. of 7th Aug. 1852, pl. 34).

When must such affidavit-witness be re-examined?

If the party intending to use the affidavit desires to re-examine his witness he must do so immediately after the cross-examination, and cannot delay the same to a future time (Ord. of 7th Aug. 1852, pl. 35).

How is the attendance of such affidavit-witness to be procured for the purpose of cross-examination and re-examination?

By giving him "due and proper notice," and paying his reasonable expenses, in like manner as if he had been duly served with a writ of *subpœna ad testificandum* before such examiner (c. 86, s. 38).

How are the expenses attending such cross-examination and re-examination to be paid?

By the parties respectively, in like manner as if the witness so to be cross-examined were a witness of the party cross-examining, and shall be deemed costs in the cause of such parties respectively, unless the court otherwise directs (c. 86, s. 38).

Where an affidavit has been filed in any cause prior to the joining of issue, what must be done in order to render it receivable as evidence?

Notice in writing must, within one month after issue joined, be given by the party intending to use such affidavit to the opposite party of such his intention (Ord. of 7th Aug. 1852, pl. 23).

How is the attendance of a witness whom it is desired to have examined orally for the purpose of using his evidence upon any claim, motion, petition, or other proceeding before the court, to be secured?

By a writ of *subpœna ad testificandum* or *duces tecum* requiring the witness's attendance before an examiner of the court, or an examiner to be specially appointed for the purpose, upon which the witness is bound to attend and be examined in like manner as with a view to the hearing of a cause (c. 86, s. 40).

NOTE.—The writ of *subpœna* issues *ex debito justitiæ* without the order of the court, and it is not necessary to obtain such an order beforehand where there is a probability that the *viva voce* evidence of a party to the motion, &c., may be required at the hearing under

sec. 39, *i.e.*, where it is thought likely that the court will require the oral examination of a party, for if the court should so require, the course would be, if the party were not present, to adjourn the hearing (*May v. Biggenden*, 17 Jur. 252; S.C. 20 Law Tim. 189; explaining *Smith v. Swansea Dock Company*, 16 Jur. 1136).

What must be done by the party requiring the attendance of a witness for examination or cross-examination with a view to his evidence being used on any claim, motion, petition, &c., *not* being the hearing of the cause?

He must give to the opposite party forty-eight hours' notice, at least, of his intention to examine such witness, and of the time and place of such examination, unless the court shall dispense with such notice (Ord. of 7th Aug. 1852, pl. 36).

What must be done by the party desiring to cross-examine any one, whether a party or not to the cause or matter, who has made an affidavit to be used on any claim, motion, petition, &c., *not* being the hearing of the cause?

He must give forty-eight hours' notice of the time and place of such intended cross-examination to the opposite party (Ord. of 7th Aug. 1852, pl. 37).

How is evidence subsequent to the hearing to be taken?

Such evidence is to be taken as nearly as may be in the manner provided with reference to the taking of evidence with a view to the hearing of a cause (c. 86, s. 41; Ord. of 7th Aug. 1852, pl. 38). By the Ord. of 16th Oct. 1852, pl. 25, the practice of the court with respect to evidence before the hearing, when applied to evidence to be taken before an examiner in any cause subsequently to the hearing, is to be subject to any special directions which may be given in any particular case.

Can the chief clerks to the judges take examinations of any and what parties, and how?

They may, when so directed by the judge of the courts to which respectively they are attached, examine parties and witnesses either upon interrogatories or *viva voce* as the judge shall direct. In such case the practice and mode of proceeding is the same as in the case of the examination of witnesses before the examiner, subject to special directions (c. 80, s. 30; Ord. of 16th Oct. 1852, pl. 26).

NOTE.—The examination here referred to is on matters pending at chambers.

MICHAELMAS TERM (1853) EXAMINATION QUESTIONS.

PRELIMINARY.

I. Where and with whom did you serve your clerkship? II. State the particular branch or branches of the law to which you have principally applied yourself during your clerkship. III. Mention some of the principal law books which you have read and studied. IV. Have you attended any and what law lectures?

COMMON LAW.

I. Was it ever necessary and is it now necessary, in a writ of summons, to mention the particular cause of action in respect of which the suit is brought? II. On what day must a writ of summons be dated, and in whose name must it be tested? III. Within what period must a writ of summons (without renewal) be served? IV. In case of a writ of summons issued against a corporation aggregate, how is the service to be effected? V. In the event of its being necessary to issue a concurrent writ of summons, can a writ for service in England be issued and marked as a concurrent writ with one for service in France? VI. Where the parties are not under terms, how many days' notice of trial must be given, and is there any and what difference in the number of days' notice to be given in a town and a country cause? VII. A plaintiff or defendant having obtained a verdict upon the trial of a cause, how soon afterwards is such plaintiff or defendant entitled to issue execution? and are there any and what means by which a party may be restrained from issuing execution until a later day? VIII. Where it is desired to charge in execution a person already in the Queen's prison, what is now the proper course to be pursued so to charge a person in execution? IX. At the time of A.'s death B. owed him £100 upon a bill of exchange, and A. also, at the same time, had a right of action against B. for libel. Can the executors of A. maintain an action against B. in respect of both or either, and which of the above causes of action? X. A. dies, and by his will appoints B. and C. to be his executors. They prove his will; B. afterwards dies, leaving C. him surviving. C., the surviving executor, then dies *intestate*, and D. becomes administrator of his effects. Debts due to A. remain outstanding, and for recovery of them actions become necessary. Can such actions be maintained by D., or who is the proper party to bring them? XI. When are simple contract debts barred by the Statute of Limitations? XII. Does it ever and

the freehold estate upon his eldest son and his issue ; what would be the best mode of carrying the testator's intentions into effect by a will ? VIII. State the principal covenants on the part of the lessee, which should be contained in a building lease of land in a town to be granted by a freeholder ? IX. State the searches which, on the part of a purchaser or mortgagee, ought to be made, in ordinary cases, before the completion of the purchase or mortgage of freehold and leasehold lands respectively ? X. Your client has purchased a freehold estate with the timber upon it, and the furniture and fixtures of the mansion, and, on the completion of the purchase, interest on the purchase money is payable by him. Does the *ad valorem* duty on conveyances attach to the whole of the purchase-money and interest or to what part of it ? XI. You are instructed to prepare the settlement on the marriage of a client, and the property to be settled consists of money in the Funds belonging to the wife ; state the general provisions which would be made by the settlement in such case ? XII. Upon an intended marriage it is proposed that the income of the personal property of the wife shall be settled upon the husband for his life, if it can be secured against being affected by any assignment or charge which he may make, and against his creditors. Can this risk be effectually guarded against, and how ? XIII. If the personal property to be settled belong to the husband, and the first life interest be reserved to him, can that be secured against the assignment, charge, or incumbrance referred to in the preceding question ? XIV. By a marriage settlement of personal estate the fund was settled upon the wife for life without power of anticipation ; remainder to the husband for life, and after the death of the survivor it was to be divided amongst the children in equal shares, sons taking vested interests at twenty-one, and daughters at that age or day of marriage. The husband is dead, and all the children have attained twenty-one. The widow and the children are desirous to have the fund transferred to them by the trustees ; can this be done with safety to the trustees during the life of the widow ? State the reason for your answer. XV. Lands are charged by way of mortgage in fee to A. and B., their heirs and assigns. A. dies, leaving B. surviving, and afterwards the mortgage debt is proposed to be paid off. As a general rule is the concurrence of the heir or personal representative of A., or which of them, required in the re-conveyance or not ? or upon what circumstances does the necessity of such concurrence depend ?

CRIMINAL LAW.

I. What is the preliminary course and form of proceedings in a criminal case as contradistinguished from civil process ? II. Which is the supreme court of criminal jurisdiction in England ? III. Have all the superior courts at Westminster concurrent and equal

jurisdiction in criminal matters, or has any one or more, and which of them, peculiar jurisdiction in such matters? IV. In what manner is a person appointed a justice of the peace for the county, and is any and what qualification necessary to render him eligible. V. What constitutes a court of petty sessions? VI. In what cases are magistrates responsible for acts done in their magisterial capacity? VII. In case of an action against a magistrate for malfeasance in execution of his office towards a party brought before him, to what notice is he entitled of the intended proceedings? VIII. What is the proper course for removing an indictment from an inferior to a superior court, and are the prosecutor and defendant equally entitled to apply for the removal? IX. Are any and what persons held in law to be excused in respect of the commission of crime? X. What is the distinction between murder and manslaughter? XI. Define the offence of forgery as settled by statute? XII. Describe the crime of embezzlement? XIII. State what constitutes the crime of arson? XIV. Describe concisely the crime of perjury, and state the evidence necessary to sustain an indictment and obtain conviction for its commission. XV. Is the truth of a libel a sufficient defence to a criminal prosecution for it, and if so, how is the defence to be made?

MICHAELMAS TERM (1853) EXAMINATION ANSWERS.

COMMON LAW.

I. *Cause of action in writ.*—It was formerly necessary to mention in a writ of summons the particular cause of action in respect of which the suit was brought, but it is not now necessary to do so (5 Mag. N.S. 72; 15 & 16 Vic. c. 76, s. 5).

II. *Date and teste of summons.*—A writ of summons must bear date on the day of its being issued, and must be tested in the name of the chief justice or chief baron of the court, or, in the case of a vacancy therein, in the name of the senior puisne judge (15 & 16 Vic. c. 76, s. 5; 5 Mag. N.S. pp. 72, 73).

III. *Time for serving summons.*—A writ of summons, not renewed, must be served within six months from its date, including the day of such date (15 & 16 Vic. c. 76, s. 11; 5 Mag. N.S. 75).

IV. *Service of summons on corporation aggregate.*—Writs of summons against a corporation aggregate may be served on the mayor or other head officer thereof, or on the town clerk, clerk, treasurer, or secretary of such corporation (15 & 16 Vic. c. 76, s. 16). This is a re-enactment of the 2 Will. 4, c. 39, s. 13 (see Pract. Com. L. 75).

V. *Concurrent writ.*—A writ of summons for service in England

can be issued and marked as a concurrent writ with one for service in France (15 & 16 Vic. c. 76, 22; 5 Mag. N.S. 74).

VI. *Notice of trial*.—Where the parties are not under terms to take short notice of trial, ten days' notice of trial must be given, whether in town or in country. The distinction between town and country causes which formerly prevailed is abolished (15 & 16 Vic. c. 76, s. 97; 5 Mag. N.S. 362).

VII. *Verdict—Execution*.—On a verdict, whether for plaintiff or for defendant, execution may be issued by the successful party within fourteen days thereafter. The judge who tries the cause, or some other judge, or the court may order execution to issue at an earlier or later period, with or without terms (15 & 16 Vic. c. 76, s. 120; Rule Hil. Term, 1853, pl. 57; 5 Mag. N.S. 368).

VIII. *Charging prisoner in execution*.—In order to charge a prisoner in the Queen's Prison in execution, a judge's order should be obtained on an affidavit that judgment has been signed, and the same remains unsatisfied. The service of this order on the keeper of the prison operates as a detainer. (15 & 16 Vic. c. 76, s. 127; 5 Mag. N.S. 370).

IX. *Actions by executors*.—The executors of A. can sue in respect of the bill of exchange given to their testator, but not in respect of the libel on him (see Key, div. "Common Law," p. 86, 3rd edit.) The reasons are stated in 5 Mag. N.S. 14.

X. *Surviving executor dying intestate*.—As the administrator of the surviving executor does not represent the testator A., actions for the recovery of debts due to the estate of A. must, after the death of the last executor, be brought by an administrator *de bonis non* of A., and not by the administrator of the last executor (see 5 Mag. N.S. pp. 432, 433, 626; Key, div. "Conveyancing," p. 145, 3rd edit., and the references there).

XI. *Limitations—Simple contracts*.—Simple contract debts (not being merchants' accounts for which an action of account will lie) are barred by the Statute of Limitations after six years from their accrual in the absence of disability and of any acknowledgment or part payment (see Key, div. "Common Law," p. 76—81; 5 Mag. N.S. 128).

XII. *Old Deed—Proof of*.—Where a deed is thirty years old it is not necessary to call the attesting witness to prove its execution, unless, indeed, there be any material alteration or interlineations, or other matter of suspicion (*Doe v. Woolley*, 8 Barn. and Cress. 22; Roscoe's Evid. 93, 5th edit.)

XIII. *Attesting witness dead*.—Where the attesting witness to the execution of a deed is dead, evidence must be given of his death, and that the signature as witness is his handwriting, and some proof should be also given of the identity of the party executing the deed,

so as to connect him with the action (4 Mag. N.S. 322; 5 Jurist, 1013; Roscoe's Evid. 87, 88, 5th edit).

XIV. Bond with penalty—Assigning breaches.—In an action on a bond with a penalty conditioned for the faithful service of a third person, if the obligor lets judgment go by default, the plaintiff must previously to issuing execution assign breaches (15 & 16 Vic. c. 97, s. 96; 8 & 9 Will. 3, c. 11; Princ. Com. Law, p. 135—137; 5 Mag. N.S. 361).

XV. Injury to father and child.—In the case of an injury to a father and his infant child, there must be two actions for compensation, the one in the father's name for the injury to himself, and the other in the infant's name, the father being, in the pleadings, named as next friend (6 Mag. O.S. 497; Key, div. "Common Law," pp. 58, 83, 3rd edit. 2 Mag. N.S. Suppl. 115).

EQUITY.

I. Jurisdiction of equity.—The principal matters over which the Court of Chancery exercises jurisdiction are, mistakes, accounts, frauds, specific performance, trusts, mortgages, partnership, compensation, election, partition, assignment of dower, cancelling and ordering delivery of documents, preserving testimony, appointments of receivers, guardians, &c. (see Key, div. "Equity," pp. 3—8).

II. Commencing suits and notice thereof.—The ordinary modes of commencing a suit in equity are by bill and by claim (5 Mag. N.S. p. 672). Notice of such suits are given to the defendants by delivering copies of the bill or claim; the writs of subpoena and of summons formerly in use being now abolished (see 5 Mag. N.S. pp. 680—682).

III. Filing written bill.—A written copy of a bill may be filed where it contains a prayer for an injunction or for a writ of *ne exeat regno*, or where it is sought to make an infant a ward of court (15 & 16 Vic. c. 86, s. 6). This, however, can only be done on the terms of the plaintiff or his solicitor giving a personal undertaking to file a printed copy of the bill within fourteen days (*ibid*, 5 Mag. N.S. 679).

IV. Next friend.—Before an infant, married woman, &c., can sue as plaintiff in a bill or claim, a next friend must be appointed, and a written authority must be obtained from such next friend and be filed with the bill or claim (15 & 16 Vic. c. 86, s. 10).

V. Requiring answer.—Where an answer is required from a defendant, the plaintiff must, in addition to his bill, file interrogatories. These interrogatories must be filed within sixteen days after service of a copy of the bill (otherwise leave must be obtained), and, if the defendant has duly appeared, a copy of the interrogatories must be delivered within such sixteen days; if he has not appeared in

due time, *i.e.*, within eight days from the service of the copy bill, then within eight days from appearance; if he has not appeared then at any time (15 & 16 Vic. c. 86, ss. 10—12; Ord. of 7th Aug. 1852, pl. 16—20; 5 Mag. N.S. 682).

VI. *Time for pleading*.—A defendant required to answer must put in his plea, answer, or demurrer (not demurring alone) within fourteen days after delivery to him of copy of the interrogatories (Ord. of 7th Aug. 1852, pl. 19). If the defendant demur alone he has only twelve days after appearance (Ord. of May, 1845, pl. 16, art. 10). The times may be enlarged (*antè*, p. 17).

VII. *Answering without being required*.—A defendant not required to answer a bill may nevertheless plead answer or demur thereto, but he must do so within twelve days from appearing, unless the time be enlarged (15 & 16 Vic. c. 86, s. 13; *antè*, p. 17).

VIII. *Evidence*.—Evidence is now taken by affidavit or by an oral examination of witnesses before an examiner. No interrogatories are now exhibited, except where ordered (15 & 16 Vic. c. 86, s. 28—38; *antè*, pp. 25, *et seq*).

IX. *Administration order*.—An administration of the *personal* estate of a deceased person may be obtained by a judge's summons and order at the instance of a single creditor, legatee, or next of kin. An administration of the *real* estate may be obtained by a creditor or person interested under the will of the deceased, where the *whole* of the real estate is vested in trustees for sale, with power to give receipts (15 & 16 Vic. c. 86, ss. 45—48; Ord. of 16th Oct. 1852, pl. 3—7; 5 Mag. N.S. 672).

X. *Sale in foreclosure suit*.—By 15 & 16 Vic. c. 86, s. 48, courts of equity may, in foreclosure suits, direct a sale of the mortgage estate instead of a foreclosure. The courts have, however, confined this to cases of difficulty in working out a foreclosure (see 16 Jurist, 1078; 20 Law Tim. Rep. 205; 21 *Id.* 209).

XI. *Transfer of stock restrained*.—The transfer of stock in the Bank of England and of the payment of the dividends thereof, may be restrained by an order, obtained in equity by motion or petition without bill, or by a writ of *distringas*, obtained on filing an affidavit (5 Vic. c. 5; Pract. Equity, 452—456; 5 Mag. N.S. 19).

XII. *Removing distringas, or order on stock*.—In order to remove the restraint on the stock, the party in whose name it is standing should make a request to the bank for a transfer or payment of the dividends, upon which notice will be given to the party restraining the transfer or payment. If the latter do not, in the case of a *distringas*, obtain an order or file a bill within eight days, the bank will allow the transfer or payment of the dividends to be made, as though no writ had been obtained. If an order has been obtained, if no bill be filed within a reasonable time thereafter, the court will discharge

same (see Pract. Eq. 452—456; *Hertford v. Suisse*, 8 Jur. 71; S.C. 1 Hare, 584; 1 Phill. 189).

XIII. *Administration—Order of payment.*—In the case of equitable assets, equality is equity, and the different kinds of creditors are to be paid rateably, *i.e.*, without any priorities; but even in equity, where the assets to be administered are *legal*, the creditors are to be paid according to their legal priorities, *i.e.*, 1. Reasonable funeral charges, and expenses of administration. 2. Debts due to the Queen. 3. Debts due to post-office up to £5, or from deceased as overseer. 4. Debts due on judgments and decrees. 5. Debts due on recognizances. 6. Arrears of rent (15 Law Journ. N.S. Chanc. 24), and specialty debts. 7. Damages upon covenants broken, &c. (1 Mag. N.S. pp. 164, 165; 13 Jur. 361), and debts by simple contract (Selw. N.P. pp. 798, 799, 11th edit.; Princ. Eq. 129).

XIV. *Trustee refusing to act.*—A trustee who has once accepted the trusts of a settlement or will cannot, without there is an express power for the purpose in the instrument creating the trust, relieve himself from the performance of the trust whilst there is anything remaining to be done. If, however, the trust be confined to the application of money or funds in the possession or control of the trustee, he may pay same into court under the 10 & 11 Vic. c. 96 (the Trustee Relief Act) as amended by the 12 & 13 Vic. c. 74 (2 Mag. N.S. 35), and so obtain a discharge as to the money so paid in, or the stock or securities so deposited or transferred (see Princ. Eq. 281, 282; Key, div. "Equity," pp. 68, 69, 3rd edit.)

XV. *Infant—Ward of court.*—In order to make an infant a ward of court, a bill or claim should be filed for the protection of his person and property, whereupon the infant is considered and protected as a ward of court (see Key, div. "Equity," pp. 47, 48, 3rd edit.)

BANKRUPTCY.

I. *Obtaining adjudication.*—In order to obtain an adjudication at the instance of a creditor, a petition must be presented by a creditor to the proper amount (4 Mag. N.S. 331, 474, 572) to the proper district court of bankruptcy. The petition must be opened within seventeen days (unless the time be enlarged) when the creditor should attend to prove his debt, and to prove that an act of bankruptcy has been committed by the debtor, and that he is a trader within the meaning of the bankruptcy acts (Key, div. "Bankruptcy," p. 47, 2nd edit. 5 Mag. 25, 26, 139, 329).

II. *Trader making himself bankrupt.*—A bankrupt who has filed a declaration of insolvency may present a petition for adjudication against himself. He must therein state his place of residence during

the previous six calendar months, the filing of the declaration of insolvency, and that he can show to the court that his available estate is sufficient to pay five shillings in the pound. The petition being signed by the trader, and attested by his solicitor, is filed with the registrar of the court, and an adjudication is afterwards made (see Key, div. "Bankruptcy," pp. 33, 44, 2nd edit.; 5 Mag. N. S. 328).

III. *Joint-stock company*.—In order to obtain an adjudication of bankruptcy against a joint-stock company, a creditor not having a judgment, &c., must (7 & 8 Vict. c. 111, s. 7) file an affidavit of debt, of a proper amount, in a court of law, and sue out a writ of summons, which must be served on the chief clerk, &c., of the company. If the company do not, within one calendar month, pay, &c., such debt, or make it appear to a judge that it is their intention to defend the action upon the merits, and enter an appearance accordingly, the company will be deemed to have committed an act of bankruptcy. By ss. 5 and 6, creditors having a judgment or decree, &c., may serve a fourteen days' notice requiring payment. So by s. 4, the company itself may resolve that it is unable to meet its engagements, and that shall be an act of bankruptcy. This act is, however, seldom acted on, as the affairs cannot properly be wound up, which is accomplished under 11 & 12 Vict. c. 45, noticed 1 Law Stud. Mag. N. S. pp. 63—65, 167—171; see also 1 Law Stud. Mag., N. S., Supp., 89; exp. Collingridge, 14 Jur. 1129).

V. *Disputing adjudication*.—A trader may before advertisement dispute the adjudication, *i.e.*, within seven days, or an extended period, not exceeding fourteen days from the service of the duplicate of the adjudication (Key, div. "Bankruptcy," p. 51, 2nd edit.). After the advertisement he has twenty-one days, if within the United Kingdom, if elsewhere in Europe three months, and if elsewhere twelve months to dispute the adjudication, which may be either by petition to the Court of Appeal in Chancery, or by action against the messenger, &c. (Key, div. "Bankruptcy," pp. 51, 52, 2nd ed.; see exp. Mostyn, 21 Law Tim. Rep. 147).

V. *Proof of debts*.—Creditors may attend in person, and prove their debts before the Commissioner, or, if living at a distance, may make an affidavit of debt, and transmit same for entry on the proceedings as a proof (2 Mag. N. S. 4). As to the time at which proof may be made, this is usually done at one of the two public meetings or an adjournment thereof, or at a meeting appointed for proof of debts, or at a dividend meeting (Key, div. "Bankruptcy," pp. 85, 86).

VI. *Proof of contingent debt or claim*.—Where the bankrupt has incurred a liability to pay money upon a contingency which has not happened before the filing of the petition, the party with whom such

liability has been contracted may enter a *claim*, which must be ripened into a proof within six months after the filing of the petition (see 12 & 13 Vict. c. 106, s. 178). But where the bankrupt has, before the filing of the petition, contracted any *debt* payable upon a contingency not happening before the issuing of the fiat, the creditor may apply to the court to set a value upon such debt, and when ascertained the creditor may *prove* for such amount and receive dividends thereon (12 & 13 Vict. c. 106, s. 177).

VII. *Proof on bills not due*.—The creditor holding a bill or note not arrived at maturity proves in the same manner as any other creditor, but if the same be not due at the time of the declaration of a dividend a rebate of interest on what he shall receive, at the rate of $\frac{1}{2}$ per cent., to be computed from such declaration of a dividend up to the time such debt would have become payable will be deducted (exp. Hill, 2 Dean. 249; Key, div. "Bankruptcy," p. 91, 2nd edit.).

VIII. *Property vesting in assignees*.—Property belonging to the bankrupt becomes vested in the trade assignees, together with the official assignee (11 Jur. 482; 15 Jur. 682) by the effect of their appointment, except copyholds, estates tail, and leases, which latter are at their election (see explanation in Key, div. "Bankruptcy," p. 65, 2nd edit.; 3 Mag., N. S., Supp., 25, 26; 13 Jur. 293).

IX. *Property not passing to assignees*.—Estates tail and copyholds do not pass to the assignees. Neither do his leaseholds unless they please to accept them (see Key, div. "Bankruptcy," pp. 65—74, 2nd edit.).

X. *Bankrupt's leases*.—The assignees are not bound to accept the bankrupt's leaseholds, but they may by their conduct preclude themselves from their right to reject same, but it requires a clear act to produce this result (see Key, div. "Bankruptcy," pp. 70, 71, 2nd edit.; 5 Mag. N. S., 141, 330; 13 Jur. 293; Graham v. Allsopp, 3 Exch. Rep. 386).

XI. *Fraudulent preference*.—Where a trader voluntarily, in contemplation of bankruptcy, and with a view to prefer a particular creditor, delivers goods to the creditor in satisfaction of the debt of the latter, it is deemed a fraudulent preference, and, as such, it is an act of bankruptcy (see 17 Jur. 477; Key, div. "Bankruptcy," 81, 2nd edit.; Smith v. Cannan, 17 Jurist, 911).

XII. *Partnership—Dissolution*.—Where one of several partners becomes bankrupt, it is a dissolution of the partnership, even as to the solvent partners, unless there is an express provision to the contrary (Gow's Partn. 218, 298, *et seq.*, 3rd edit.).

XIII. *Partnership—Joint and separate effects*.—Where partners become bankrupt, and there is separate as well as joint property, and also joint and separate creditors, the commissioners are directed by order of 6th of March, 1794, to keep distinct accounts of the

joint estates, and also of the separate estates ; and what is found to belong to the separate estates, shall be applied, in the first place, in or towards satisfaction of the debts of the respective separate creditors, and in case there shall be any overplus of the joint estate, after all the joint creditors shall be paid and satisfied their whole demands, the shares of the bankrupts in such overplus are to be applied in or towards satisfaction of their separate creditors ; in case there is any overplus of the separate estates, after all the separate creditors shall be paid and satisfied their whole demands, the overplus of such separate estates is to be carried to the account of the joint estate, and to be applied in or towards satisfaction of the joint debts (Mont. and Ayr. Bankr. Pract. 318 ; Exp. Green, 1 Deac. and Chitty, 382 ; Exp. Bolton, Buck, 7 ; Henley's Bankr. 174, 3rd edit.). A separate creditor is not entitled to interest out of the surplus till the joint creditors are paid (Exp. Minchin, 2 Glyn and Jam. 287 ; Archb. Bankr. 411, 8th edit.).

XIV. *Certificate*.—The bankrupt's certificate is granted by the commissioners, but creditors having given notice, and the assignees without any notice may be heard to oppose same (see Key, div. "Bankruptcy," pp. 120, 121, 2nd edit.).

XV. *Arrangement with creditors*.—The creditors of a trader may be compelled to accept a composition where the trader having assets to the amount of £200 petitions for protection, and obtains the consents of three-fifths in number and value of the creditors who have proved to the amount of £10, to a proposal to pay a composition on his debts. The creditors may be compelled to submit to an arrangement with such trader, where the consents of six-sevenths in number and value of the creditors to the amount of £10 has been obtained (12 & 13 Vict. c. 106, ss. 213, 215, 224, 225 ; 1 Mag. N. S. 257—262 ; see 5 Mag. N. S. 315, 395).

CONVEYANCING.

I. *Chose in action*.—A chose in action is a right to recover by an action or suit a debt or duty, or damages for an injury sustained (see explanation in Key, div. "Common Law," p. 31, 3rd edit. ; Com. Dig. tit. "Assignment," C 1).

II. *Assignment of chose in action*.—A chose in action cannot, in general, be assigned so as to enable the assignee to sue at law for the debt, duty, or damages ; but the assignment would be binding in equity. Still the assignee has no right to sue in equity, unless the assignor prevents an action at law (Hammond v. Messenger, 9 Sim. 327). Bills and notes, some bonds, warrants, &c., may be sued for *at law* by the assignee, but these are exceptions, either by the custom of merchants or by statute (see Key, div. "Conveyancing," pp. 31, 32, 3rd edit.).

III. *Judgment affecting lands.*—A judgment at law, until registered, does not, as to purchasers, mortgagees, or creditors, affect the lands of the debtor; after registry, and during the continuance of the registry, it affects the whole of the debtor's lands, whether freehold, copyhold, or leasehold, as against purchasers or mortgagees having notice of such judgment, and with respect to freeholds, such registered judgment, without notice, affects only a moiety thereof, whilst with respect to leaseholds the judgment has no effect until execution is lodged with the sheriff. The remedies by the creditor to recover his debt out of lands whether freeholds or leaseholds are at law by writs of *elegit*, and as to leaseholds only also by writs of *fieri facias*. In equity, payment is enforced as on a charge. The reader is referred for further explanation to Key, div. "Conveyancing," pp. 149, 150, 3rd edit.; 4 Mag. N. S. 121—126; 5 *Ibid.* 386).

IV. *Purchased land subject to judgment.*—From what has been stated it will readily be concluded that a judgment creditor, of whose registered judgment the purchaser had at the time notice, may recover his debt out of the lands, notwithstanding the conveyance. The creditor's right in the case of a conveyance depends upon notice or not to or by the purchaser, supposing the judgment to be a registered one. If the judgment be not registered notice is immaterial (3 & 4 Vict. c. 82, s. 2). Upon the subject of the law of judgments, as affecting purchasers by virtue of the recent statutes, the reader should refer to the case of *Freer v. Hesse* (17 Jur. 177; and on appeal, *Id.* 703), and should also bear in mind what Sir Geo. Turner there said, viz., "The law on the subject is particularly unsettled." The case shows the difficulty arising out of the doctrine of notice or *not* notice, and raises a question as to the effect of judgments once registered not having been re-registered in due time.

V. *Wills Act—Upon what wills operating.*—The Wills Act, the 7 Will. 4 and 1 Vic. c. 26 came into operation on the 1st day of January, 1838, and it extends to all wills made on or after that day, but not to wills made before though the testator died subsequently. It is the date of the will and not of the testator's death that determines whether the will is or not within the act.

VI. *Blind testator.*—Where a will is executed by a blind testator it is prudent, though not necessary, to have the same read over to him in the presence of the attesting witnesses, and for the attestation clause to mention it was so done, all the other usual requisites being, of course, observed (see *Longchamp v. Fish*, 2 Bos. and Pal. N.R. 415; *Moore v. Pain*, 2 Lee's Rep. 26; *Edwards v. Fincham*, 7 Jur. 25). In the last case it was said that in the case of a blind person there must be a clear knowledge on the part of

the testator of the contents of the instrument; but that it is not necessary to produce evidence of the identical paper having been read over to the party.

VII. *Settlement by will.*—In such a case as that put in the question, the personal and real estate should be vested in trustees, in trust as to the whole to pay the widow during her life the dividends, rents, and profits thereof, and after her decease, in trust by sale or mortgage of a sufficient part of the real estate to raise such a sum as together with the money in the funds shall amount to £20,000, and subject thereto in trust for the testator's eldest son for life without impeachment for waste, and after such son's decease in trust for his first and every other son successively, according to seniority of birth, and the heirs of the body of each such son. And failing such issue, in trust for the daughters of the son equally as tenants in common, and the heirs of their respective bodies, with limitations in the nature of cross-remainders between such daughters and the heirs of their respective bodies, as to both original and accruing shares, with an ultimate limitation to the right heirs of the testator.

VIII. *Covenants in lease.*—The principal covenants on the part of a lessee to be contained in a building lease of land in a town where granted by the freeholder, should be the following:—For payment of rent reserved and of the taxes; that lessee will, on or before a certain fixed time, build one or more houses of a certain class and according to the terms specially mentioned and agreed on, including the making of drains, building walls or making fences, laying down pavement, the amount to be expended about each house being stated; to keep in repair the houses erected and the fixtures, &c., therein, and to paint, &c.; to insure and to keep the houses insured, and to lay out money received in re-building houses, &c., and to make up any deficiency; not to permit offensive trades to be carried on, or, if not to be shops, that the houses shall not be converted into shops; that lessee will quit at the end of term and leave houses in good repair.

IX. *Searches for incumbrances.*—The searches which, on the part of a purchaser or mortgagee should in ordinary cases be made, are the following:—The registry of the county, if in Middlesex or Yorkshire, Bedford Level, &c., for registered judgments, lites pendentes, and crown debts; annuities; if there be any reason for supposing the mortgagor or vendor to have been insolvent or bankrupt, searches should be made at the insolvency and bankruptcy courts, &c. There is a registry for county court judgments. In practice solicitors run much risk by neglecting to make these searches.

X. *Stamps on conveyance—Fixtures, &c.—Interest*—No *ad valorem* duty is payable in respect of the interest or of the furniture, if the same were, as it is to be presumed it would be, handed over, and a receipt given for the price, but the fixtures, if annexed to the free-

hold and standing timber, could only pass by the deed, and an *ap valorem* duty is therefore payable on them (see Dart's Vendors, 282, 364, 2nd edit.; Hayes' Concise Convey. xxiii).

XI. *Settlement of money in the funds.*—In the absence of any peculiar circumstances, the settlement should provide for payment of the dividends of the funds to the wife for her life for her separate use, then for the husband for his life, with a power to the husband and wife jointly, or to the wife alone, or to the survivor to appoint the funds to and among the children of the marriage, equally or in such parts and shares as may be thought proper, and in default of appointment the funds to be divided equally among the children of the marriage, or to go to a sole one. The ultimate limitation in default of issue should be, if the funds alone were settled, in favour of the next of kin of the wife. It is to be observed that no general rule can be laid down applicable to every instance, but each case must depend on its peculiar circumstances. The duty of the solicitor is to ascertain the intentions of the parties and to inform them the legal effect thereof, so that the settlement may be framed according to the purposes intended.

XII. *Settlement on husband of wife's income, determinable on bankruptcy or alienation.*—Before answering the question, which is with the one following of great practical importance, it may be observed that the general rule is that property cannot be settled upon a man or upon a feme sole in such a manner that the interest of the donee shall continue after bankruptcy or insolvency, or in such a manner as to take away the donee's power of alienating (4 Martin's Com. 367, note; Brandon v. Robinson, 18 Ves. 429; Ross v. Ross, 1 Jac. and Walk, 164; Graves v. Dolphin, 1 Sim. 66), but property not originally belonging to the donee may be so settled that on bankruptcy or insolvency or on the donee's affecting or attempting to alienate it, it shall be divested and go over to some one else (Lewes v. Lewes, 6 Sim. 304; Lester v. Garland, 5 Sim. 222; Whitfield v. Prickett, 2 Keen, 408; 2 Powell on Devises, 2nd edit. 275). In the case of Rochford v. Hackman (16 Jur. 212; fully stated in 4 Mag. N.S. 271), Sir George Turner, then V.C., but now one of the Lords' Justices, stated that on examination there appeared to be two rules laid down with respect to similar points to those we are considering, viz., first, the property cannot be given for life any more than absolutely, with any restriction upon alienation, and that any such restriction is void if annexed to a life estate, just as much as if annexed to an estate in fee; secondly, that although a life estate be expressly given by the first part of the will it may be well determined by an apt limitation over in the subsequent part of the will. As to whether a mere proviso for cesser will suffice to determine the interest, see *re Dickson*, 1. Sim. N.S. 37; S.C. 15 Jur. 282.

Having stated thus much, we may proceed to reply to the question. The income of the wife's personalty can be secured against being affected by any assignment or charge which the husband may attempt to make or against his creditors, by settling the same on him until he shall assign or charge the same or attempt so to do, or shall suffer any judgment to be made against him, or shall become insolvent or bankrupt, and on the happening of any of these events directing the income to be thenceforth paid to or for the benefit of the wife, or children, &c. (see *Brandon v. Robinson*, 18 Ves. 429; *Bythewood's Convey.* 2nd edit. p. 16). "It has long been settled beyond controversy, that, previously to marriage, property coming from the wife or her friends may be settled on the husband in such manner as to be defeasible on bankruptcy" (exp. *Hill*, 1 *Cook's Bank*. 232).

XIII. *Settlement on husband of his own property, determinable on bankruptcy or alienation.*—Though the property of the wife may, as we have seen in the previous answer, be legally so limited as to be divested on the husband's bankruptcy, and so prevent his assignees from having it, and though the property of the husband himself might, previously to the marriage, have been secured against the claims of creditors, by an absolute trust for the separate use of the wife, yet it is clearly established that the husband's property cannot be so limited or settled as to be held by him until bankruptcy, and, upon the event, to be shifted to a trustee for the wife or any other person (*Higginbotham v. Holme*, 19 Ves. 88; 4 *Martin's Convey.* 368, 369).

XIV. *Settlement on wife without power of anticipation.*—Inasmuch as the provision in the settlement restraining anticipation by the wife, would not be of any force on her becoming a widow during the continuance of her widowhood, she might join with her sons in appointing the fund, and it would not then be a breach of trust in the trustees to transfer the fund to the widow and children accordingly (see *Key*, div. "Conveyancing," p. 92, 3rd edit.; 4 *Mag. N.S.* p. 676—686, 5 *Mag. N.S.* p. 308—310; *Tullet v. Armstrong*, *Myl. and Cr.* 390; *S. C.* 4 *Jur.* 34; stated 4. *Mag. N.S.* 681—683).

XV. *Mortgage to two—Death of one.*—On a mortgage to two, their heirs and assigns, they are joint tenants of the legal estate. On the death of one the whole legal estate goes to the survivor, and the heir, therefore, of the deceased mortgagee cannot be required to join in the reconveyance. But where the money is not stated in the mortgage, which, however, it always is in properly drawn mortgages, to be the joint moneys of the mortgagees belonging to them on a joint account, and does not contain a declaration that the receipt of the survivor shall be a sufficient discharge, the executor of the deceased mortgagee will be a necessary party to the re-

conveyance; for as a mortgage is a mere security for a debt, the benefit as well as the obligation of the security follows the nature of the principal, and consequently a moiety of the money belongs to the personal representative of the deceased mortgagee, and not the whole to the surviving mortgagee alone (see Key, div. "Conveyancing," p. 87, 3rd edit.) In equity, though the mortgagees are considered as joint tenants of the legal estate, they are looked upon, where not stated to be trustees (which it is never prudent to mention) or joint owners of the money, with power to the survivor to give receipts, to be tenants in common of the money, so that the share of the deceased mortgagee vests in his representatives, who are then necessary parties to the reconveyance, in order to give a proper receipt for the money. It is sometimes considered that a power to the survivor to give receipts for the purchase money on the sale will enable the survivor alone to reconvey, but this is obviously wrong. Where the parties are not trustees and the moneys are advanced by both in equal proportions, and the intention is that each should be entitled to a moiety of the moneys when paid off, it is better to give them several interests, or at least to omit the power for the survivor to give receipts (see Burton's Comp. pl. 1479, 1480; Coote on Mortg. 532, 2nd edit.)

CRIMINAL LAW.

I. *Preliminary proceedings*.—The preliminary course of proceeding in a criminal case is to have the party accused brought before a justice of the peace, for him to decide whether or not the party shall be put upon his trial. This is done even where the coroner's jury has investigated the matter. The way in which the alleged offender is brought before the magistrate is either by his having been taken by a police-officer on his own responsibility or on a warrant granted for that purpose. In trivial offences a summons to the party is issued in the first instance. On the hearing of the complaint, the party is either convicted, if it be an offence punishable summarily, or is discharged or committed for trial, in which latter case bail is frequently taken (see Key, div. "Criminal Law," pp. 11, 79; 5 Mag. N.S. 142).

II. *Supreme criminal court*.—The supreme court of criminal jurisdiction in England is the House of Lords, though frequently the Queen's Bench is so called (see Key, div. "Criminal Law," p. 2, 2nd edit.)

III. *Criminal courts*.—Of the superior courts at Westminster the Queen's Bench alone has peculiar and exclusive jurisdiction in criminal cases (6 Mag. O.S. 365, 366; 4 Black. Com. 265, 312; Key, div. "Criminal Law," p. 2, 2nd edit.)

IV. *Justice of the peace for a county*.—Justices of the peace for

counties are appointed by the Queen's special commission under the great seal, but before acting the justice sues a writ of *dedimus postestatem*, empowering certain persons to administer the necessary oaths to him. The qualification (except for certain persons) is an estate in possession of the yearly value of £100, or a reversion or remainder on a lease for lives, or a term for years determinable on lives, or for a certain term originally created for twenty-one years with reserved rents of the clear yearly value of £300 per annum (Key, div. "Criminal Law," pp. 9, 10, 2nd edit.; Woodward v. Watts, 17 Jurist, 790).

V. *Petty sessions*.—The meeting of two or more magistrates for the purpose of acting either ministerially or judicially in any cases within their jurisdiction constitutes a petty sessions (Key, div. "Criminal Law," p. 7, 2nd edit.; 5 Mag. N. S. 531; per Lord Denman, 13 Jur. 405).

VI. *Liability of magistrates*.—Magistrates are liable for acts done in their magisterial capacity only where they have acted without jurisdiction or in excess of jurisdiction (though not until the conviction or order has been quashed), or maliciously and without probable cause (see 11 & 12 Vic. c. 44; Key, div. "Criminal Law," p. 18, 2nd edit.; 20 Law Tim. Rep. 233).

VII. *Notice of action against justices*.—In case of an action against a justice of the peace for malfeasance in exercise of his office, he is entitled to a calendar month's notice of action (11 & 12 Vic. c. 44, s. 29; Key, div. "Criminal Law," i3, 2nd edit.; see Haylock v. Sparke, 20 Law Tim. 276; as to *hona fides* entitling a defendant to notice of action, see Read v. Coker, 17 Jur. 991).

VIII. *Removing indictment*.—In order to remove an indictment from an inferior to a superior court, a writ of *certiorari* is issued. The writ may be had by either prosecutor or defendant, but the defendant must enter into a recognizance (see Key, div. "Criminal Law," pp. 7, 95—97, 2nd edit.)

IX. *Excuse from incapacity*.—Persons of unsound mind, infants under fourteen in certain cases, and under seven in all cases, and married women (21 Law Tim. Rep. 80) in certain cases are esteemed incapable of committing, or at least excused from, the guilt of crime (4 Steph. Com. 108, 2nd edit.; Key, div. "Criminal Law," p. 17, 2nd edit.)

X. *Murder and manslaughter*.—Manslaughter is the unlawful killing of another without express or implied malice, whereas murder is such a killing with malice, either express or implied (4 Black. Com. 176—200; Key, div. "Criminal Law," p. 22, 2nd edit.).

XI. *Forgery*.—Forgery is the fraudulent making or alteration of a writing to the prejudice of another man's right, with a view to put it forth as a genuine document, so as to defraud some one (Reg. v.

Marcutt, 2 Car. and Kirw. 356; 14 & 15 Vict. c. 100, s. 8; Key, div. "Criminal Law," p. 47, 2nd edit.).

XII. *Embezzlement*.—Embezzlement is the unlawful appropriation of personal chattels, securities, or moneys not at the time in the actual or legal possession of the owner, with intent to deprive him thereof (Dickinson's Quarter Sess. 261, 355, 5th edit.; 12 Jur. 942; 1 Mag., N. S., Suppl. 51; Key, div. "Criminal Law," 37—39, 2nd edit.).

XIII. *Arson*.—Arson is the wilfully and maliciously setting fire to a house, outhouse, or other building, or structure, or construction mentioned in the several statutes relating to arson or burning with intent to injure or defraud some other person (R. v. March, 1 Mood. C. C. 182; 4 Black. Com. 222; 4 Steph. Com. 169; Key, div. "Criminal Law," pp. 29, 30, 2nd edit.).

XIV. *Perjury*.—Perjury is the crime of wilfully swearing falsely on the administration of a lawful oath in a judicial proceeding, or before a person having authority to hear, receive, and examine evidence, respecting a matter material to the issue or point in question. There must be two witnesses, and it should be proved that the oath was lawfully administered, that the false swearing was committed in a judicial proceeding, or at least before a person having authority to hear, &c., evidence under 14 & 15 Vict. c. 99, s. 16, and that the evidence was false to the knowledge of the party, &c. (see Key, div. "Criminal Law," p. 49—54; 14 & 15 Vict. c. 100, s. 22; 3 Mag. N. S. 240, 241; Archb. Crim. Pl. and Ev. 577, *et seq.*, 10th ed.).

XV. *Libel—Truth*.—The truth of a libel is a sufficient defence to a prosecution for it, where it can be shown that it was for the public benefit that the matter charged should be published. The defendant must in his plea allege the truth of the matters contained in the libel, and that the publication thereof was for the public benefit (6 & 7 Vic. c. 96, s. 6; Key, div. "Criminal Law," p. 68, 3rd edit.; Reg. v. Newman, 17 Jur. 617).

CORRESPONDENCE.

The Proposed Alterations in the Examination (vol. v., p. 685).

GENTLEMEN AND FELLOW STUDENTS.—Having seen by your last number (v. 5, N. S. p. 685—688) that you were desirous of having the opinions of articled clerks upon the above subject, I propose addressing to you and to my fellow law students, a few remarks upon the matter.

I consider the present mode of conducting the examinations, to

say the least of it, faulty in the extreme, and not in one particular only, but in several. In the first place, then, I propose submitting to your consideration the proposed manner of keeping the profession of solicitors select from men of no education. This great and important end (for great and important it is, now that the legal profession, and our branch of it in particular, is taking a higher stand) has *never*, in my humble opinion, been fully answered. And now, when it is of vital importance to the interests of our country that attorneys should be men of liberal and ingenuous education, the duty upon the articles of clerkship has been *considerably* lowered, and even that slight check greatly lessened, and the profession thrown open to *any* man who can scrape up £80, and who chooses to work *pretty hard* at the *law*, and the law alone. Is it not, gentlemen, a proceeding most unfair, not only to the profession itself but to the country at large? When the duty was at the sum of £120, even then it put but a small obstacle in the way of those, of *whatever* sort they might be, who were desirous of entering the ranks of the law.

Now, gentlemen, the *only possible* way I can see of excluding the "Ignoble vulgus" is by instituting a strict examination upon general literature, and more especially classics and French, before the candidates are allowed to be articulated. I say more especially classics and French, not because I consider this part of literature as indispensable in the legal profession, but because I think it would be far the most effectual barrier to all who have not received a sound and **LIBERAL** education. And in fact both classics and French, French in particular, are at the present day considered to form a very essential ingredient in the education of a gentleman. I would, with all due deference, beg to differ from "Studens" as to the persons competent to be examiners in the proposed preliminary examination. The plan I venture to propose is this: That there should be, either half-yearly or quarterly, one general meeting of whatever candidates there may be in London, before the present examiners, on a day to be fixed by them, who, being all gentlemen of high standing and liberal education, and also accustomed to propounding questions and determining upon merits, must be the best judges of whether a person is fit for the profession or otherwise, and also that the examinations should be conducted as the present ones, in *legal* lore, are. "Studens" proposes that the candidates should be examined by "some competent *local* authority." There are, I think, many objections to this plan. For, in the first place, there is a *possibility* of the *local* authority not being competent (I say *the* local authority, for I imagine that the persons holding a *certain* office, e.g., a magistrate, would be in that case the persons appointed for each district, throughout England and Wales, merely because they hold such an office, and not with any respect to their competency).

Again, there *might* be personal feeling between some candidate and such local authority. And again, it is not fair to the whole body of candidates that their different sections should have their merits tested by different men, for "*Quot homines, tot sententia.*" Unless there is a certain standard fixed, up to which each candidate must come, we must remember that what one man considers a sufficient degree of excellency, another does not. And I for my part do not see how a standard can be fixed, unless the whole body be examined by the same persons.

Considering all these circumstances put together, I think it is evident that the plan mentioned by "Studens" is hardly a feasible one. Again, "Studens" has mentioned three modes of rewarding the best proficient in the *legal* examination. I perfectly agree with "Studens" in his remark that it would be almost, if not quite, an impossibility for the examiners to decide upon the merits of each candidate with respect to the whole of his fellow competitors. I feel greatly obliged to him for his remarks upon that mode of classification, for the thought had never struck me before what an amount of labour it would be imposing upon the examiners.

There has, gentlemen, as you are all, I make no doubt, aware, recently been started by a gentleman who deserves, and, I think I may add, has, all our best thanks, viz., Mr. Cordes, a petition for the purposes of classification. I signed that petition (as I dare say other of my fellow students have done) thinking only of the *immense* advantages derivable from its success, to articulated clerks, never for a moment giving a thought to whether its object was practicable or not. I say this not that I repent having signed it, far from it, but because I think it would be much more likely to succeed in its aim had a different mode, not fraught with so much toil, been suggested. However, I think we may with safety hope that it will answer its *great* end, which, I presume, was to have marks of distinction given to the deserving, and not alone to have the names classified in a certain order. It will, I hope, be sufficient to have brought before Parliament the object desired to be attained; to it let us leave the way of attaining that object.

Out of the three ways mentioned by "Studens," the only two which appear to be feasible, are, 1st, to divide the competitors into three or more classes; and, 2nd, to give to a limited number a mark of distinction. Now, of these two the first, I think, possesses several advantages over the other. It would be the nearest to the intentions of the petition before mentioned, and would not be entailing a very great degree of trouble upon the examiners. It would be the most advantageous, for it would be a greater stimulant to exertion than giving to a small number a reward of merit, and leaving the remainder "*Æquales.*" For what better should we be then? What

would an idle student care if he was securely hidden in the rank of the "*Æquales*." This plan would certainly be a motive for exertion to the student really anxious to make a good lawyer of himself, but to no other. I will venture to propose a mode which might, I think, with a little revision, be acted upon. The candidates might be divided into three classes, viz., "*Indifferent*," or "*Sufficient*," "*Good*," and "*Best*."

Fellow students, would any one of you allow his name to appear in the class "*Indifferent*?" Would not such a classification as I have mentioned induce you to strain every nerve to mount to class "*Best*?" But I think I need hardly ask the question. So much for this part of my subject.

There is a particular in the examination of articled clerks which, in my opinion, needs alteration as much as any, and which I am surprised that I have seen nowhere commented upon. It will be necessary for my purpose to premise that the present mode of examination as recently altered, is to make it necessary to *passing* (if I may use the term) that the candidate should answer in three branches, viz., conveyancing, common law, and equity, and in *one* of the two other, the choice being optional. Now, this arrangement appears to me to be unfair, especially to country students. For what opportunities can country articled clerks have of seeing any practice in equity, which is one of the three essentials? You must all be well aware that equity and bankruptcy cases are "*few and far between*" in the country. The case is this: all the candidates for admission meet together, town and country, promiscuously mingled. To all and each of them are fifteen questions on each of the five branches propounded, in three of which they are *obliged* to answer. One of these three consists of equity. It is, I believe, almost as unfair to the town as to the country students. For, if I surmise rightly, by far the greatest portion of town practice consists of equity, bankruptcy, and chancery practice, and there is comparatively little conveyancing going on. On the other hand in the country conveyancing is almost everything. With the town students, however, I have nothing to do. I am only mentioning what I think ought to be altered for the good of the country students.

The only way of remedying this defect, that I can see, is to divide the whole number into two different and distinct classes, viz., town and country, and to give questions accordingly, that is according to each class's opportunities. This, I think, would be likely to effect an improvement, by giving to all a better chance. To argue upon other grounds, it is very certain that hardly one out of twenty country clerks settle finally in London, and the same rule applies to town articled clerks. Why, therefore, compel persons to give the *greatest* portion of their attention to a branch of the law likely to be of but little use to them?

Not that I would for a moment entertain the idea that a country lawyer need know nothing of equity and bankruptcy, for a man to be a good lawyer must have *at least* a moderate knowledge not only of one part but of every part of the law. But, as I said before, why force a man to give by far the largest portion of his study to what will not be of as much use to him as another branch would?

And, now, gentlemen, I think I have trespassed quite enough upon your time and patience, and hoping that my poor suggestions may be of use, and apologising for the length of my letter,

I beg to remain, yours, &c.,

C. CYDWELYN ELLIS.

Ruthin, December 12, 1853.

MOOT POINTS.

No. 1.—*Diversion of Water—Injury.*

A railway company, in 1846, purchased part of the estate of Lord C., situate in the township of M., for the purpose of their works. On the land so purchased is the commencement of a tunnel about three miles long. Prior to the construction of the railway works, there was a small valley (or rather a gully) which extended from a spring near to where the tunnel enters the hill, to a point westwardly of the line of railway, which we will call "A." Down this gully flowed an ancient watercourse.

In the course of the formation of this tunnel a great quantity of water was found. A drain was cut by the company along the side of the tunnel into the gully (just below the spring) so as to convey away the water collected in the tunnel; and consequently the flow down the gully was greatly augmented.

The water having been found to be of a very valuable quality, and peculiarly well adapted for dyeing purposes, W. L. took a lease of the land surrounding the point A., "and of the stream of water flowing past the same," of the owner, Lord C., and upon that land W. L., about two years ago, erected large dye works.

The railway company have lately diverted the water flowing from and collected in the tunnel, to their station about half a mile distant. From the station it flows into a common beck. By this diversion W. L. has sustained serious damage.

Quære, can the railway company be restrained from continuing the diversion? Who would be the proper party to take the proceedings? Would W. L. be entitled to compensation for injury?

A. H. OWEN.

No. 2.—*Husband's Liabilities for Wife's Debts, dum sola.*

A. married his wife in 1852. She died in the month of October, 1853. After her death several accounts were sent in to A. for payment, which accounts were contracted by A.'s wife, *dum sola*. A. had no knowledge of her being in debt at the time of their marriage, until after her decease, no applications having been made to him until the accounts were sent in as above. Applications were made to the wife during the marriage, and she paid something on account of the debts. Of this, however, A. knows nothing. Is A. liable to pay the balance of those accounts?

A. H. OWEN.

No. 3.—*Cheque—Stamp—Premature Payment.*

A. draws a cheque upon B., a banker, for £1,000, payable to C. or bearer, *per draft at fourteen days*. C. loses his cheque on the day on which it is drawn, and the finder of it on the same day, and before payment can be stopped, applies to the banker under the fictitious name of C., and obtains payment of the cheque *in cash* upon paying to the banker a sum equal to fourteen days' interest upon the £1,000. Upon these facts I would ask—1. Whether a cheque so drawn (authorising payment per draft at fourteen days) is exempt from stamp duty, and if not, as this was an unstamped cheque and consequently an invalid payment, is A. liable to C. in an action for the amount? I should add that I wish to consider the law in reference to this point as existing before the recent act. 2. Whether the banker was justified in paying in cash (and without having drawn a draft), that which, by the cheque, he was but authorised to pay by cheque at fourteen days, and if not so justified is he liable to repay to B. the amount of the loss sustained by him, he (B.) having, by the irregularity, been deprived of the opportunity of stopping payment upon discovering his loss?

Suppose the opinion be in favour of C.'s right of action as well against A. as against B. (the banker), which of these two remedies is it advisable to adopt?

N. LEAROLD, Huddersfield.

No. 4.—*Custody of Deeds.*

By indenture dated 1st January, 1848, certain freehold hereditaments were conveyed, and certain copyhold hereditaments were covenanted to be surrendered to J. S. The value of the freeholds is about equal to that of the copyholds, and the latter are held of a manor, the custom of which is that the youngest son is the heir. Upon the death of J. S. intestate, who is entitled to the custody of the deed, his eldest or youngest son?

LUCAS CORDES (Newport).

No. 5.—*Feme Coverte—Separate Estate—Power of Attorney.*

A feme covert is entitled under the will of a deceased relative to the income of £100 per annum for her separate use and payable to her half-yearly by the trustees of the will. She and her husband are about to leave this country with the intention of permanently residing abroad. Can the lady in question, either by herself or together with her husband, execute a valid power of attorney enabling a friend to receive the £100 a-year and apply it as the wife shall from time to time direct. The mooter is of opinion that no such power, whether executed by the wife alone or by the husband and wife conjointly, would have any validity.

LUCAS CORDES (Newport).

No. 6.—*Winding up Acts, 1848 and 1849—Trustees—Official Manager.*

A joint-stock company, possessing real estate vested in trustees, was ordered to be wound up under the winding-up act, and an official manager was duly appointed by the master in the usual manner. On a sale of the real estate is it necessary that the trustees should join in the conveyance as well as the official manager? The mooter conceives that it is not, but the purchaser's solicitor contends that it is.

LUCAS CORDES (Newport).

No. 7.—*Walker v. York and North Midland Railway Company.*

¶ Can any of your readers inform me whether a new trial has been moved for in this action, and if so, where it is reported? The trial at *nisi prius* is reported 3 Carrington and Kirwan, 279, and the case is a very important one on the law of railway carriers.

LUCAS CORDES (Newport).

No. 8.—*Right of Protestant to remain in a Roman Catholic Chapel.*

Has a Protestant a legal right to enter into an ordinary Roman Catholic chapel (not being a chapel attached to a private house), and to sit down and remain there during the celebration of divine service provided he conducts himself with decency and propriety? and if so, would his taking notes of the sermon be a sufficient breach of propriety to justify the officiating priest or other officials belonging to the place in summarily ejecting him from the chapel? Also, does the law recognise such a chapel as a "place of public worship?"

The mooter conceives that the 1st and 3rd questions are to be answered in the affirmative, and the 2nd in the negative.

LUCAS CORDES (Newport).

No. 9.—*Dower—No Deed of Uses of Fine.*

A fine is levied in the year 1828, the deforciant being married?

the wives join the property belonging to the husbands), but there is no deed to lead or declare the uses, and the husband of one of the women is now dead, having died six or seven years ago. Is his widow entitled to dower, and what time is allowed her after her husband's death to make her claim? If dowable, should she proceed by writ of dower or file a bill in equity.

THOMAS LUMLEY.

No. 10.—Stamp Act—Liability to Penalty.

A., deputy steward of a copyhold manor, gave a receipt for quit-rents to B. for the sum of £2 Os. 6d., minus 1s. 2d. allowed for income-tax, without a stamp receipt. Is A. liable to a penalty? The mooter conceives he is, as the proper amount the receipt is given for is £2 Os. 6d. the quit-rents—the 1s. 2d. being allowed to the lord for property tax.

Fox.

No. 11.—Tenancy—Taxes—Land Tax.

A. agrees to let B. a farm, and an agreement is entered into on the 11th day of October, 1853, by which agreement B. covenants to pay "all tithes, rates, and taxes, whether parliamentary or otherwise, which may come against or be in anywise chargeable upon the said lands and hereditaments." The property is subject to unredeemed land tax. Does the above clause prevent the tenant from deducting the land tax and property tax from his rent? The mooter is of opinion it does not.—2. Would it make any difference if the tenant had expressly covenanted in his agreement to pay land tax and landlord's property tax? In this case, also, the mooter thinks that portion of the agreement would not be binding at law upon the covenantor, although he admits there is room for contending for an opposite construction of the 73rd sec. of 5 & 6 Vic. c. 35.

T. A. GLEED.

No. 12.—Trust—Common Law Remedy.

A trustee under the ordinary form of an assignment for the benefit of creditors has moneys remaining in his hands after paying to the creditors of the assignor the full amount of their respective claims, and otherwise satisfying the trust of the deed. By what means can the assignor recover the balance from the trustee? Is his sole remedy in equity as upon a trust, or may he sue at common law as for moneys had and received by the trustee to his (the assignor's) use?

N. LEAROLD (Huddersfield).

No. 13.—Execution of Trust—Specific Performance.

A testator devised estates to B. upon trust to convey to C. Instead of this, by reason of some arrangement made by C. and by C.'s wish, B.

conveyed to D., and C. joined in the conveyance as a releasing party: D. has since sold his estate, and the purchaser now refuses to complete in consequence of B.'s having conveyed to D. instead of C: Can a specific performance be enforced? N. L.

No. 14.—*Legacies—Deficiency of undisposed of personality.*

A. B., by his will, dated 9th June, 1848, made the following disposition:—"I give and bequeath unto C. D. all my freehold and chattel property upon trust for the following purposes; firstly, that he suffer my wife to take and have for her own use and maintenance the rents and uses thereof for the term of her natural life, and after her decease and after all my just debts and testamentary expenses are liquidated, then I give and bequeath all that my dwelling house where I now live, and the garden and orchard belonging thereto, unto my nephew E. F., to him and to his heirs for ever. I give and bequeath unto my nieces G. H. and J. J. my orchard called Withey Trees, to be held by them (share and share alike) and their heirs for ever. I give and bequeath to each of the three children of William W., viz., F., S., and L., the sum of five pounds, together with any interest which may accumulate thereon after my wife's death, to be paid to them on their respectively attaining the age of twenty-one years," and then appointed the said C. D. executor. The cottage, &c., and also the Withey orchard are both long leasehold. The widow has lately died, and the executor has converted the furniture into money, which only realised between £4 and £5. The funeral expenses of the testator were about that amount, which, I apprehend, the executor was justified in paying out of the proceeds of the sale of the furniture, &c. There was a charge of about £20 on the property. There being no fund out of which to pay the three legacies of £5 each, have the legatees any claim on the leasehold property given to the nephew and nieces? And had the proceeds of the furniture, &c., realised been more than sufficient to pay the funeral expenses, would not the three pecuniary legatees have had the first claim? as the "just debts and testamentary expenses" were, I apprehend, a charge on the leaseholds.

ANSWERS TO MOOT POINTS.

No. 177.—*Mortgagee's Title—Quietus—Specific Performance*
(vol. v., p.).

I am of opinion that it is a valid reason for non-completion, be-

cause, *prima facie*, the estate is vested in the Crown, and the vendor is bound to get a quietus entered, and, until that incumbrance is satisfied, there can be no legal estate conveyed.

The practice to get a quietus is to send a statement of facts in the form of a petition to the Attorney-General, and pay him a fee of £10. 10s., upon which he gives an authority for the judgment office to enter a quietus.

G. G. NORRIS.

No. 123.—*Set-off* (vol. v., pp. 572, 641, 643, 699).

Cary v. Webster, Str. 480; *Cox v. Prentice*, 3 Maule and Selw. 344; and *Buller v. Harrison*, Cowp. 565, cited by Mr. Cordes, at page 699, are cases where money was paid to the agents *by mistake*, or where the money was paid to the agents under such circumstances that *the party paying it* might recover it back from them.

In the case mooted by Mr. Richards there can be no doubt but that the tenants paying the rent to A. knew that he was clerk to the attorney, and that the attorney was the only proper party, as the agent authorised by B., to receive their rents.

It is stated in *Brown v. Husband* (4 Barn. and Ad. 611), that an action cannot be maintained by the party paying the money "against a clerk or an attorney who, *without paying it over*, received it expressly under the authority, and for and in the name of his employer." Again, the receipt of the clerk, if one were given, would undoubtedly be signed by him on behalf of his master, and this would be tantamount to naming his principal. In *ex parte Hartop* (12 Ves. jun. 352) it was decided "that an agent is not responsible, if he names his principals as the person to be responsible." I, therefore, conclude that A. would not be liable in any action that might be brought by the tenants to refund the amount received from them.

Restricting myself to the point at issue, whether B. be entitled to recover from A., I would remark that in the case mooted, it does not appear B. authorised A. to receive any rents for him; indeed, B. may not have been aware of the existence of such a person as A. A. receives the rent for his employer (the attorney), who was the agent of B., and it is laid down in *Cartwright v. Hately* (1 Ves. jun. 292) that "an inferior agent is *only* accountable to his immediate employer, and *not to the principal*." Indeed, it is an established rule that a master is liable for the acts of his agents or sub-agents, however remote, provided the act be done in the course of their employ, and it be not a wilful tort (6 T. R. 411; see 1 B. and P. 404; 4 M. and S. 27).

The relation of principal and agent can (I apprehend) only take place where one person authorises another to do acts or make engagements in his name; I must, therefore, confess I see no connection between A. and B., so as to make A. responsible to B.

I have been at some trouble in endeavouring to find a case analogous to the case mooted, where the point at issue bore a resemblance to the point in discussion, and where the decision would lead me to a different conclusion from that I before expressed at page 641, but I have been hitherto unsuccessful, and I therefore must adhere to my former opinion that A. would *only be accountable* to his master, and that B. could have *no remedy but against the attorney*.

A. H. OWEN.

No. 178.—*Stamp—Receipt in full* (vol. v., p. 707).

In schedule 1 to 55 George III. c. 184, I find the following:—
“And where any sum of money whatever shall be therein expressed or acknowledged to be received in *full of all demands*, 10s.”

I cannot find in the late stamp act (16 & 17 Vic. c. 59) any words that repeal this, and therefore I think a penny stamp *would not be sufficient*.

JUNIVS (Huddersfield).

No. 164.—*Marriage of Feme Sole Trustee—Breach of Trust—Liability of Husband* (vol. v. p. 692).

By the death of the wife the suit abates, and supposing no bill had been filed or other proceedings taken during the wife's lifetime, the husband would not have been liable after her decease.

G. G. N. (Nottingham),

No. 146.—*Statute of Limitations* (vol. v. p. 636).

I think that an advertisement in the public papers as in this case does not take a debt out of the statute. As I view the case A. B. acknowledges no particular debt. The party here claiming is in the same position as to his account as if he never had an account against A. B. The latter advertises for his creditors to send in their accounts, and his answer to this claimant would be that he owed him nothing. As to what is a sufficient *writing* to rebut the statute of limitations see *Spong v. Wright*, 9 Mee. and W. 629; *Cripps v. Davis*, 12 Mee. and W. 159; *Hart v. Prendergast*, 14 Mee. and W. 741; *Walter v. Lacy*, 1. Man. and Gr. 54; *Bayley v. Ashton*, 12 Ad. and El. 493; *Gardner v. M'Mahon*, 3 Q. B. 561.

LECHLANAR.

No. 166.—*Power to raise Money—Lapse* (vol. v., p. 693).

If A.'s will bears a date in or subsequent to the year 1838, which, as no date is mentioned in the question, I will assume to be the case, B. took an estate in fee in the land subject to a power vested in the trustees to raise £1,000 by mortgage or otherwise. Suppose that the power was exercised by the trustees by a mortgage in their names, they would have a legal estate in the money raised upon trust

to pay over the interest to C. for his life, and after his death to his issue for ever. C., therefore, had an equitable interest in the money for his life, and his issue (if he had had any) would have taken an absolute interest, also equitable in the £1,000, on the death of their ancestor. If the property in question had been realty, C. would undoubtedly have been entitled to an estate tail therein; and it is a rule that where personalty is limited in words, which, if applied to realty, would confer upon the taker an estate tail, the devisee of such personalty shall take *an absolute interest* therein (*Chandless v. Price*, 3 Ves. 99; *At. Gen. v. Bright*, 2 Keen 57). Applying this rule to the present case C. takes an absolute equitable interest in the £1,000, which on his death would devolve upon his executors, unaffected by the circumstance that he died leaving no issue. As, in my opinion, no lapse occurred, it is unnecessary to discuss the point as to what would have become of the money raised in the event of a lapse.

W. T. P.

No. 170.—*Devise of Trust Estates* (vol. v., p. 624).

There can be no possible doubt upon this point, but in order to satisfy the mooter I quote from the judgment of V. C. Shadwell in *Lindsell v. Thacker* a passage which may never have been brought under his notice:—"I take the rule to be as laid down in *Lord Braybrooke v. Inskip*, namely, that a trust estate will pass by general words in a will unless it can be collected either from the expressions in the will or from the purposes or objects of the testator that he did not mean that the legal estate should pass; as, for instance, where the devise is to a trustee in trust to sell and receive the proceeds, or *where the estates are given to one for life with remainder over*. There the object of the devise in the one case and the mode of limitation in the other are inconsistent with the intention to pass a dry legal estate (12 Sim. 162).

W. T. P.

No. 162.—*Accidental Injury—Woman run over by Dog-cart* (vol. v., N.S. 692).

I agree with the mooter that the woman has no remedy against the driver, because he was doing a lawful act without negligence. *Aston v. Heaven* is a somewhat similar case; there a coach was upset by the horses taking fright, and it was holden that there being no negligence the injured passengers could not recover (2 Esp. N. P. C. 533).

E. J. H.

WORKS FOR LAW STUDENTS.

We are sorry to be compelled to announce that no material progress has been made towards the commencement of the **LAW STUDENTS' LIBRARY**, the plan of which was sketched in the last number (p. 11—13). The only obstacle is the want of subscribers, for, strange as it may appear, it is yet true that we have received as yet but comparatively few orders for the work. We are sorry for this, as, believing the plan to be a very excellent one, we are anxious to make a commencement, but prudence prevents our doing so under present circumstances. We have little doubt that eventually the work will be commenced, and that makes it the more annoying, for it is evident to us that many are keeping back in order to see if the work will be really brought out. These persons are certainly taking effectual steps to realise their doubts, and yet we have so much faith in the undertaking that we feel they are only delaying its commencement, and not defeating it altogether. We speak in this frank manner because our experience of articled clerks enables us to form a pretty accurate opinion of them as a body: had we not such experience we should certainly despair of ever establishing the "**LIBRARY**."

We ought in fairness to mention that some of our subscribers have objected to the works chosen, on the ground that they are *too difficult and abstruse for students*. We give these gentlemen full credit for the good intentions, which, as they state, and we do not doubt, actuated them in making this objection, and we feel, indeed, greatly indebted to them for the trouble they have taken. We think there may be something in the names of Littleton and Coke suggestive to the student of exceeding abstruseness, and it must be admitted that their works do require some care and diligence in their perusal in order to be understood, and that much obsolete and even irrelevant matter is to be found therein. But then we thought we had pretty clearly announced our intention not to load our volumes with this undesirable matter, and that being done, we should conceive that the remaining matter would be found not too difficult even for the youngest student, who must prepare himself for difficulties at some period of his career, and which it certainly is desirable he should overcome as early as possible. Having done this, all his subsequent reading will be comparatively easy; without it he will be always groping in the dark.

With respect to the choice of the works, we may observe that there can be no doubt as to their utility. Of Littleton, Ch. Just. Montague is reported to have said: "The *Tenures* contain the most true and sure register of the foundations and principles of our law."

Roger North (Study of Law, p. 11) says : " The text of Littleton is accounted law, and no other book hath that authority. It was originally compiled for the initiation of a student, and is, therefore, the most plain and intelligible, without any sort of obscurity, and contains the fundamentals of law touching estates and contracts ; however fitted this book is to the capacity of a beginner, the very adepts in the law are not frequently ashamed to read it : *I knew a Lord Keeper that used to read it every Christmas as long as he lived*" (see further 1 Mag. O. S. pp. 17, 207, 280 ; 2 *Id.* 1—3). Of " Coke's Comment upon Littleton" (or " First Institute," as it is frequently called) Chief Just. Reeve asserted that when well understood all the *difficulties* of the law might be considered as overcome, and that without a full understanding of it no man could pretend to be a sound lawyer. The editor of North's " Study of the Law," does not scruple to call it the "*bible* of the English lawyer." Lord Eldon (2 Twiss, p. 51), writing to a student, says : " Find time to read Coke upon Littleton *again and again*. If it be toil and labour to you, and it will be so, think as I do when I am climbing up to Swyer or to Westhill, that the world will be before you, when the toil is over ; for so the *law-world* will be if you make yourself complete master of that book." The many alterations since this period have not at all affected the force of this advice *as to the parts which remain law*. Mr. Preston was in the habit of recommending Serj. Hawkins' Abridgment of Coke upon Littleton (1 Abstracts, pp. 222, 225, 241, &c.) since, he says, " Hawkins has selected *the parts most material to a modern lawyer*." This was the work we intended several years ago to edit (see 2 Mag. O. S. 47), but we think it preferable to select the best portions of Coke, rather than to give, as Hawkins does, a paraphrase of the comment. Besides, for the "*First Series*" Hawkins would not be found elementary enough, and even his selections contain very much obsolete matter. The truly learned Mr. Butler (Reminiscences") says : " The reminiscent may appear to recommend too much attention to Littleton and Coke ; but he has never yet met a person thoroughly conversant in the law of real property who did not think with him that *he* is the best lawyer, and will succeed best in his profession, who best understands Coke upon Littleton. There is not in the whole *GOLDEN BOOK* a single line which the student will not, in his professional career, find on more than one occasion eminently useful." As to Sheppard's (or rather Judge Dodderidge's " Touchstone of Common Assurances," Ch. Just. Willes (2 Wilson's Rep. 78) said : " I rely much upon Sheppard's Touchstone, which is a most excellent book." Mr. Preston (1 Abst. p. 213) says : " Nor should the student be without Sheppard's Touchstone, a book which of itself is a comprehensive library of the law on the Assurances of Property, given in clear and perspicuous terms, with

comparatively few errors." It is pretty well known what the opinion of, perhaps, the soundest of our common law judges, Mr. Baron Parke, is respecting this work: it is said that he knows every line of it, and certainly he frequently quotes it from memory. It is unnecessary to say more respecting the works chosen for the "LIBRARY:" their perfect fitness cannot be doubted *so far as their authority and intrinsic value* are concerned; the only question arises as to the difficulty attending their study.

We are of course anxious to meet the real wants of our readers, rather than to stand on any preconceived notions of our own, and we have therefore given the communications above referred to some consideration, and coupling with them the fact of so few orders having been received, we have determined to modify our proceedings so as to meet the objections above referred to, and also, we trust, any others which may have arisen in the minds of our readers. We do not purpose to abandon our original plan, but rather to establish its real utility, and insure its ultimate adoption. This we propose to do by first issuing a series of works to be called "*The First Series*" of the "LAW STUDENTS' LIBRARY." The same excellent works, as mentioned in the previous number (with the addition of another to follow immediately after "*COKE UPON LITTLETON*," viz., "*SHEPPARD'S TOUCHSTONE*"—a work whose real value is only appreciated by our best lawyers), will furnish the materials for this "*First Series*," the only difference consisting in a mode of editing them. As to this we have determined to apply the plan so successfully adopted in some modern works on languages and the sciences, i.e., the issue of a *graduated series of works*, the one being introductory to the other, and so serving to facilitate the acquirement of the doctrines of the law, and rendering the progress of the student certain and comparatively easy. The works we have referred to furnish a good example of this graduated system, for Littleton is introductory to Lord Coke's Comment, and both to Sheppard's Touchstone, whilst the study of those works will considerably facilitate the understanding of the more difficult but not less excellent reports of Lord Coke. But this is not all the graduated plan; for we purpose that the "*First Series*" shall be strictly introductory to the "*Second Series*" (for such the works to be issued in accordance with the notice in the preceding number will be termed to distinguish them from the present series). This will be more fully understood when we state the plan of the "*First Series*." The mode of editing the works in this series will be to give (chiefly in the words of the author) the most important of the propositions, principles, or maxims, leaving the less prominent and more minute portions for the "*Second Series*." These propositions, &c., of the first series will be confined to what is now law, except where it may be useful to contrast the

past and present state, or to illustrate the application of the new law, in which cases some indication will be given that a change has been made by adding some such expression as "formerly" or "prior to the statute of," &c. Notes containing concise notices of the effect of recent statutes, and of important decisions where they illustrate the text, will be added in their proper places, and occasionally the attention of the student will be drawn to the differences existing between propositions which at first sight would appear to be identical. In short, an endeavour will be made in a concise form to keep the student on the alert, and to exercise as well as interest him. In addition, copious questions will be given at the end of each work, framed in such a manner as to enable the student to examine himself orally or by means of written answers in a full and complete manner, both on the text and the notes. The utility of this, when applied to works of so great authority as those we have chosen, must be pretty obvious, and will be more evident still when we state that the questions will completely cover the text and notes, so that not a single proposition in the works will be without a question, and, therefore, the answering of these questions by the reader will enable him to test his progress in a most satisfactory and complete manner, as well as assist him in acquiring an indelible knowledge of the contents of the works. Indeed, we intend that the works should not be merely read, but *studied and learnt "by heart,"* and this is a justification of our choice of such eminent lawyers, whose works are of so great authority, and whose propositions we shall in most cases give in their own words on account of such authority. We should state, indeed, that with the first book, *i.e.*, "LITTLETON'S TENURES," we shall not be able to give the exact words in some instances, which arises from the mode in which Littleton wrote, that is, chiefly by way of example, instead of abstract propositions. But in such cases we shall take great care to follow the sense of his propositions, and as the sections will be referred to, it will be a useful exercise to the reader to compare our statements with the sections *in extenso*.

The above plan of our "*First Series*" has been the result of much consideration: and, in framing it, we have kept in mind that the slow and unsatisfactory progress made by articulated clerks in their studies arises chiefly from the want of a connected series of works, which should be properly introductory the one to the other, and also to the absence of questions on the text, and to enable the reader to test his acquisitions. It is true a few books have some questions on their contents, but they are too meagre to be of any essential use. We are convinced that to make questions really useful, they must embrace every proposition in the work, and yet more, that the work itself should be so composed as to admit of questions being usefully framed on it, and of readily affording the required

answers to the questions. Our questions will necessarily occupy some space in each volume, but they will not, we are sure, be thought to do so uselessly.

We have to remark that probably some of our readers may consider this "*First Series*" cannot possibly be of any use to advanced students, but must be intended altogether for "junior students," who may be just commencing the A B C of the law. We beg to assure the most advanced students that unless they are already well acquainted with the maxims, principles, and propositions of Littleton, Coke, and Sheppard, they will find the "*First Series*" as useful (if, indeed, not more so) to them as to junior students. For it is to be feared that if they neglect this series, they will lose the advantages which the plan, *taken as a whole*, offers by a graduated course of study. It is perfectly astonishing how little lawyers are in general acquainted with the grounds or principles of the law. This arises chiefly from modern works being for the most part but a collection of marginal notes, each depending on its own facts, without any attempt to assign them to any known or recognised principle of the law. Every one, in these days of rapid and indiscriminate reporting, trusts to his memory of what the cases decide, and endeavours to square the case in hand with the reported decisions. Hence the many failures in litigated cases, and also the comparative scarcity of scientific lawyers. Indeed, we should recommend both the mere student and the actual practitioner to read over such works (let it be remembered we are not speaking of our own productions, but of those which are written by the greatest lawyers, and who are admitted to be lights and authorities in the law), as we propose to issue at least once in every year, in order to refresh his memory with the principles of the law, which are so apt to be forgotten in the mass of modern reported cases. Let the artful clerk ask himself what forms the essential difference between the barrister and the solicitor: it will be found in this that the former devotes two or three years of his studentship to the study of the principles of the law before he attempts to master the modern cases, whereas the latter is content to begin and end with the modern decisions or text-writers, without caring to go back to the older authorities, where the true principles are to be found, often, indeed, presenting themselves in a very uninviting aspect.

We have now said all that we think necessary on the subject, and must draw these, perhaps, too lengthy observations to a close, by reiterating that, by the above plan, we are aiming at the introduction of a more exact and scholastic form of work than has hitherto been presented to the profession, and we feel so certain that our proposed "*First Series*" will receive support, that we intend to commence operations forthwith, though of course, we shall be glad

to receive orders for this "*First Series*," with a view to ascertain how many should be printed. It will be understood that the second series will travel over the same ground as the first, but will also contain much *additional* and more *abstruse* matter, which, there can be no doubt, will be digested much more easily by means of the information gained from the previous study of the works in the "*First Series*."

We cannot, until some progress has been made in the printing, state the exact extent of each work in the "*First Series*," but as the object is to give only the more prominent and important propositions, the work will necessarily be much shorter than in the other series. We shall, however, we fully expect, be in a condition in a few days to give more exact information as to this, and to announce when the first work (Littleton's Tenures) will be ready, and the price of the same.

DIGEST OF RECENT CASES.

ANNUITY.—*Enrolment not necessary.*—A deed does not require enrolment under the 55 Geo. 3, c. 141, s. 2, as a grant of an annuity, unless the alleged grantor is a party to the instrument. Thus, a release by the grantee to the grantor (who does not execute the release) of a portion of the annuity, does not require enrolment. *Humphreys v. Jenkinson*, 8. Excheq. Rep. 684; S.C. 22 Law Journ. N.S. Exch. 250.

APPROPRIATION.—*Irrevocable appropriation of money.*—Where money is paid by A. to B., to be applied by the latter pursuant to a binding contract between the parties, A. cannot revoke its destination. *Yates v. Hoppe*, 9 Com. Ben. Rep. 541.

ATTORNEY.—*Scrivener—Acts of partner not binding.*—An attorney, *quod* attorney, is not a scrivener. It is no part of the business of an attorney, *quod* attorney, to hold money placed in his hands until he has an opportunity of laying it out. Many attorneys do it, but not in consequence of their character as attorneys. Therefore the receipt of money by one member of a firm of attorneys, to be retained until a good security for it can be found, is not such a dealing by a partner as is within the scope of the partnership authority, so as to bind the other partners without further proof of authority. *Harman v. Johnson*, 17 Jur. 1096.

BANKRUPTCY.—*Mortgage of stock in trade—Act of bankruptcy.*—An assignment by way of mortgage by a trader of his stock and implements of trade, where such assignment does not include a moiety of the whole of his effects, is not *per se* an act of bankruptcy, although the effect of putting the instrument in force would be to

stop the business; to constitute an act of bankruptcy the deed must be sufficient to produce insolvency. *Young v. Ward*, 8 Exch. Rep. 221; S.C. 22 Law Journ. N.S. Exch. 27.

See, however, exp. Bayley, 17 Jur. 475; S.C. 22 Law Journ. N.S. Bankr. 45, where, indeed, the assignment was of so much of the trader's estate and effects as to render it impossible for him to continue carrying on his trade.

BANKRUPTCY.—*Order and disposition—Relation back of title of assignees, &c.*—By the order which is required by the 125 sec. of the 12 & 13 Vic. c. 106 (see 3 Mag. N.S. 250) to vest the property in goods which are in the order and disposition of the bankrupt as reputed owner, in the assignees or vendee of the goods, their title has relation back to any act of bankruptcy, in the same way as the title of the assignees (except, indeed, where the adjudication is on the bankrupt's own petition, when the title of the assignees relates back only to the act of bankruptcy on which the adjudication is had (see *Stevenson v. Newnham*, 17 Jur. 600) has relation back by the general assignment, i.e., to any act of bankruptcy which can be proved to have been committed subsequently to the petitioning creditors' debt, though not the act on which the adjudication was obtained. *Heslop v. Baker*, Excheq. Rep. 411; S. C. 22 Law Journ. N.S. Ex. 333.

COUNTY COURTS.—*Recovery of possession of tenements by landlord—Value of £50.*—The Court of Queen's Bench (Crompton, J., dissenting) has adopted the decision of the Exchequer to the effect that the county courts have jurisdiction to give possession to a landlord of tenements let at a rent not exceeding £50, no fine having been paid, although the annual value at the time of the plaint does exceed £50. *Harrington v. Ramsay*, 22 Law Journ. N.S. Exch. 326; 17 Jur. 1029.

EXECUTORS.—*Carrying on testator's business.*—An express direction in a will that the executors are to continue carrying on the trade of the testator does not authorise such executors to embark in the trade any of the testator's general assets beyond those already embarked in it at the time of his decease. The case of *Hankey v. Hammock* (Buck, 210; 3 Madd. 148) does not, nor does any other case, go to the extent of saying that a mere direction by a testator for the continuance of his trade is to operate as a charge of the trade debts contracted in continuing the trade on all the estate of the testator; the consequence of such a rule would be to suspend all the other directions of the will during the period for which the trade is to be continued. If the assets engaged in the trade be not sufficient to enable the executors to carry on the trade, they should apply to a court of equity for directions as to what they should do in the administration of the estate. *McNullie v. Acton*, 17 Jurist, 1041.

FALSE REPRESENTATION.—*Deceit—Privity between the parties.*—In a recent case the doctrine of the case of *Watson v. Poulson* (15 Jur. 1111; 4 Mag. N.S. 46) was repeated more circumstantially by Lord Campbell delivering the judgment of the Court of Queen's Bench in the following terms: "If A. fraudulently makes a representation which is false (and which he knows to be false) to B., meaning that B. shall act upon it, and B., believing it to be true, does act upon it, and thereby suffers a damage, B. may maintain an action on the case against A. for the deceit, there being here the conjunction of wrong and loss, entitling the injured and suffering party to a compensation in damages." The doctrine of *Langridge v. Levy* (2 Mees. and W. 519; S.C. in error, 4 *Id.* 337) and *Winterbottom v. Wright* (10 *Id.* 109), that a privity should be shown to exist between the parties to the action explained, to refer to causes of action arising in respect of contracts, or from the defendant's negligence causing a damage to the plaintiff, and not to apply to actions founded, irrespective of contract, upon a false representation fraudulently made by the defendant to the plaintiff, for the purpose of inducing the plaintiff to act upon it, the plaintiff showing that by so acting upon it he had suffered damage. *Gerhard v. Bates*, 17 Jur. 1097.

LEASE.—*By remainder-man in tail—Immediate estate, though no entry or attornment.*—A demise by way of grant for a term of years, to commence immediately, made by a person entitled to an estate in tail in remainder, expectant upon the determination of a life estate during the lifetime of the tenant for life, operates as a conveyance of an estate for years carved out of the remainder, and vests the estate immediately in the grantee, without entry, by virtue of, the 4 Anne, c. 16, s. 9, which makes such a conveyance effectual, without an actual attornment of the tenant of the posterior estate upon which the remainder is expectant. *Doe dem. Agar v. Brown*, 2 Ell. and Blackb. 331; S.C. 22 Law Journ. N.S. 2 B. 432.

POWER.—*An absolute power of appointment distinguished from property in the subject-matter.*—The recent case of *Ewart v. Ewart* (17 Jurist, 1022) is deserving of attention. V. C. Wood there stated that though in many cases an absolute power of appointment is equivalent to an estate or actual property in a thing (see *Bray v. Hammersley*, 3 Sim. 513; 2 Cl. and Fin. 453; *Phipson v. Turner*, 9 Sim. 227), yet the distinctions still existed between the interest which a person possesses in a thing as property and that which he may acquire in the same thing by the exercise of a power. Thus, the interest of persons taking subject to a power cannot be displaced except by an actual exercise of the power, or under such circumstances as induce courts of equity to relieve against an incomplete execution (*Innes v. Sayer*, 1 Mag. N.S.

188—190 ; Prin. Eq. 25). And, as in order to the exercise of a power there must be evidence of an intention to execute it, a general assignment of all a man's estate and interest will not pass property over which he has a general power of appointment, unless, indeed, he has no other property upon which the instrument could be intended to operate. The doctrine that an absolute power of appointment is property is applied to prevent creditors from being defeated by the act of the debtor (see *Holmes v. Coghill*, 7 Ves. 503 ; 12 *Id.* 216 ; *Townsend v. Windham*, 2 Ves. sen. 1 ; *Shirley v. Ferrers*, 1 Bro. C.C. 41). These cases establish that where a person having a power of appointment and debts executes the power in favour of a volunteer, a court of equity will draw out from the volunteer so much as is necessary for satisfying the debts. *Ewart v. Ewart*, 17 Jur. 1022.

SET-OFF.—*In equity.*—The doctrine of equity as to set-off was well explained by the Lord Chancellor in a late case. Set-off was recognised as a reasonable act by courts of equity long before it found its way into the courts of common law. It was a favourite doctrine of a court of equity that where there were cross demands the one should be set off against the other, and this is so now, with some modifications in courts of law also, by statutory provision. Set-off, which is so consistent with natural equity, is an arrangement which a court of equity will be very ready to assist, and will look to any circumstances that occurred at the time of the transaction between the parties, in order to say that a set-off did in fact take place. *Wallis v. Bastard*, 17 Jurist, 1107.

SET-OFF.—*In equity*—*Debt due from a testator and debt due to his representatives.*—The Master of the Rolls has clearly explained the right to set-off in cases of claims on deceased persons by parties who have since become indebted to the personal representative. If there be a debt due to a person at the time of his death, that is, a debt which his representative can recover only by suing in his representative character, in such case the debtor can set off any debt due to him from the deceased. But if the cause of action accrued after the death of the creditor, the personal representative may sue either in his representative character or in his individual character. If in such case the personal representative brings the action in his own name and individual right (as he ought to do), and not as representative, no set-off can be pleaded. If the personal representative bring the action in the name of the deceased, a set-off arises merely from this, that the representative has, by the improvident form in which he has brought his action, admitted that the right of action accrued in the lifetime of the deceased, and if it did, a right of set off arises ; whereas, if it accrued subsequently to the death of the creditor, then no set-off arises. *Lawbarde v. Older*, 1J Jur. 1110

VENDOR AND PURCHASER.—*Notice of tenant's interests.*

—It is not uncommon for purchasers to complete their purchases without making any inquiries of the tenants in possession of the property as to their rights, relying on the statements of the vendor as to the same. The danger of this course will be evident from the following decision of the Privy Council:—If there be a tenant in possession of lands, a purchaser is bound by all the equities which the tenant could enforce against the vendor, and this equity of the tenant extends not only to interests connected with his tenancy, but also to interests under collateral agreements; the principle being the same in both classes of cases, viz., that the possession of the tenant is notice that he has some interest in the land, and that a purchaser, having notice of the fact, is bound, according to the ordinary rule, either to inquire what that interest is, or to give effect to it whatever it may be. However, there is no authority going to the extent of saying the notice of a tenancy is notice of the title of the lessor, or that a purchaser neglecting to inquire into the title of the occupier is affected by any other equities than those which such occupier may insist on. In this case it was also held that the rule is settled as to parol evidence of notice, viz., that a purchaser is not bound to attend to vague rumours—to statements by mere strangers, and that a notice, in order to be binding, must proceed from some person interested in the property. *Barnhart v. Greenshields*, 22 Law Tim. 178.

WILL.—*Revocation, how far it operates.*—The Court of Queen's Bench reaffirmed the doctrine laid down by them in *Doe dem. Evers v. Ward* (16 Jur. 709; stated 4 Mag. N. S. 562), to the effect that a revocation by a subsequent codicil of a gift contained in a will, whether such revocation be one by express words or by devise inconsistent with the gift in the will, will operate so far only as is necessary to effectuate the intention of the testator. Therefore, where a testator devises his "real estates," and also separately his "tithes," and then revokes the devise of his "real estates," this will not operate as a revocation of the devise of the tithes, though such tithes are really properly includeable under the term "real estates." *Williams v. Evans*, 17 Jur. 1093, overruling decision of V. C. Shadwell in 17 Sim. 98.

THE EDUCATION OF LAW STUDENTS.

We have before (vol. v, p. 554—558) noticed the requirements of the inns of court as to the examinations of students for the bar, and we now give the "Prospectus of the Lectures" to be delivered in Michaelmas Term, the several lecturers or readers of the inns of

court, so far as concerns equity, real property, and common law. These may be useful to articulated clerks as pointing out a very useful course of study. Our readers are not, generally speaking, interested in the subjects of the civil law or constitutional law, so that we omit the courses on those branches.

EQUITY.

The Reader on Equity proposes to give, during the ensuing educational term, six public lectures on the History of the Court of Chancery; its Procedure, and Relation to the Courts of Common Law.

First Lecture.—Judicial System of the Anglo-Saxons—Important Alterations effected on the Norman Conquest—The *Aula Regia*—The System of Writs—The Cancellarius—Establishment of the Superior Common-law Courts—The Chancellor of the Exchequer—Influence of the Civil Law—The Court of Parliament—Authority of the Chancellor as sole Judge in Equity established.

Second Lecture.—Principles on which the Equitable Jurisdiction was established—Their early recognition—Reference to Conscience and the rules of the Casuists—The Clerical Chancellors—History of the Court since the Reformation—Subjects of Equitable Jurisdiction.

Third Lecture.—The Great Seal of England—Its Custody—The Privy Seal, Signet, and Sign-manual—The Court of Requests—The Star Chamber—Privy Council—Common-law side of the Court of Chancery—Jurisdiction of the Chancellor over Lunatics and Infants—Appeal from the Chancellor to the House of Lords.

Fourth Lecture.—Procedure in Chancery—Suit commenced by Writ of Scire Facias—By Writ of Subpœna—English Bill—Process to compel Appearance—Recent Alterations in the Process—Defence by Demurrer—By Plea.

Fifth Lecture.—Relation of Pleadings in Equity to Pleadings at Common Law—Interrogatories—Practice of compelling a Defendant to answer on Oath—How far sanctioned by the Civil Law—Setting down a Cause on Bill and Answer—Mode of taking Evidence in Chancery—The Hearing—Adjournment of Chambers—Office of Master in Chancery—Its abolition.

Sixth Lecture.—Nature of the relief afforded in Chancery—Judgments at Common Law—How far the Court of Chancery acts in rem—Specific Performance of an Agreement—Injunction—Powers of the Court under Statutes.

In addition to the public lectures, it is proposed that two classes shall be formed, as during the preceding terms, for the study of the Principles and Practice adopted in Courts of Equity, each class to meet for one hour three times a week: the junior class will read Smith's *Manual of Equity Jurisprudence*, and Mitford's *Pleadings in Chancery*; the senior class will read Story's *Commentaries on Equity Jurisprudence*; the second volume of White and Tudor's *Leading*

Cases, commencing with *Howe v. The Earl of Dartmouth*; *Mitford's Pleadings in Chancery*; and *Wigram's Points in the Law of Discovery*. Each student will be expected, in the intervals between the meeting of the class, to peruse portions of these and other works pointed out by the Reader, and to be prepared, at the ensuing meeting of the class, to answer and discuss questions arising out of the subjects of their reading.

The Reader on Equity will deliver his public lectures at Lincoln's Inn Hall on Thursday in each week during the Educational Term, commencing at two o'clock p.m. The Reader will receive his private classes on Monday, Wednesday, and Friday evenings in each week, from seven to nine o'clock, in the Benchers' Reading Room at Lincoln's Inn Hall.

LAW OF REAL PROPERTY, &c.

The Reader on the Law of Real Property, &c., proposes to deliver, in the ensuing Educational Term, a course of six public lectures on the Power of Testamentary Disposition and the Construction of Wills.

I. Introduction. General View of the Extent of the Testamentary Power with Reference to Real and Personal Property previous to the passing of the 1 Vict. c. 26.

II. 1 Vict. c. 26. The Property which may be disposed of by Will; sect. 3. The Capacity of Testators; sects. 7, 8, 11, 12. The Execution and Attestation of Wills; sects. 9, 10, 13—17.

III. On the Revocation and Revival of Wills; sects. 18—23.

IV. On the Construction of Wills.

1. The Operation of Residuary and General Devises; sects. 24—28.

2. The Construction of particular Words; sect. 29.

3. The Estate taken by Trustees under a Devisee; sects. 30, 31.

4. Lapse; sects. 32, 33.

The Lectures to be delivered to the private classes will comprise the following subjects;—With the senior class, the text of Sugden on Powers will form the basis of the lectures; and the latest decisions illustrating the principles there laid down will be examined and commented on. With the junior class, the effect of recent legislation upon the Practice of Conveyancing, with reference to the framing of Purchase and Mortgage Deeds, will be discussed.

The public lectures will be delivered at Gray's Inn Hall on Friday in each week, at two p.m., (the first lecture to be delivered on the 4th November). The private classes will be held in the North Library of Gray's Inn, every Monday, Wednesday, and Friday morning, from a quarter to twelve to a quarter to two o'clock.

COMMON LAW.

The Reader on Common Law proposes to deliver during the

Educational Term, commencing the 1st November, 1853, six public lectures of a general character, intended as introductory to those of the succeeding terms. The subjects to be treated of in these six lectures will be as under :—

Lecture I.—On the Advantages derivable from a Study of the Law, and the Mode in which that Study should be pursued.

Lecture II.—Law, how distinguished from Equity. The leading Branches of our Common Law defined and characterised.

Lecture III.—The Origin, History, and Jurisdiction of each of the three Superior Courts of Common Law.

Lecture IV.—Of Legal Rights and Remedies generally.

Lecture V.—Mode of Procedure in the Superior Courts.

Lecture VI.—Jurisdiction of, and Mode of Procedure in, the County Courts.

With this private class the reader on Common Law will consider in detail the subjects comprised in the three latter lectures of the above course. He will inquire into the nature of Legal Rights and Remedies, and into the respective Jurisdictions of the Superior and County Courts. The books to be used with the private class will be the following :—Blackstone's (or Stephen's) Comm. vol. 1, introduction, sects. 2, 3; vol. 3, book 5, chap. 7, and those portions of chap. 8 which concern purely Personal Rights and Actions; Smith's Leading Cases; and any recent Treatise on the Law and Practice of the County Courts.

The lectures on Common Law during the ensuing term will be delivered, and the private classes will meet in the hall of the Inner Temple as under :—

The public lecture on Monday in each week at two p.m.; the first lecture to be delivered on Monday, the 14th November.

The private class on Tuesday, Thursday, and Saturday in each week from a quarter to twelve to a quarter to two o'clock.

MUTUAL CORRESPONDENCE.

The following are the only additions to the last published (*antè*, pp. 15, 16), *viz.* Mr. J. F. Crump; Messrs. Barnett and Marlow, Walsall; Mr. T. P. Digkin, at L. Clark's Esq., Ludlow; Mr. H. Gaskin, at M. Stevenson's, Esq., Chatham. The address of Mr. J. Bassett (late of Rochester) is *now* at Messrs. Willoughby's, No. 4, Lancaster-place, Strand, London.

The following names are to be *erased* from pp. 15, 16; *viz.*, Mr. T. R. Addison (of Soham), Mr. W. M. Miller (of Norwich), Mr. T. V. Roberts (of Calthorpe-street), and Mr. J. W. Smith (of Gravesend).

We are sorry to notice that there is an evident tendency in our

subscribers to relinquish the system of correspondence. In some instances we are aware that this arises from the circumstance of too much correspondence being received, and the desire of such parties to confine themselves to a select few. We know this to be the case in several instances. Others, on the other hand, complain that they do not get letters enough, which seems very strange. We cannot personally interfere in the matter, but we do advise our subscribers to make a fair trial of the system; and then we are convinced that its benefits, both direct and indirect, will be considerable. And we know that, in many instances, it has had a most important effect on the subsequent career of articulated clerks.

For the information of several subscribers who have written to us, we beg to state that the correspondence is carried on altogether independently of ourselves, the parties whose names are put down in the lists communicating in a direct manner with each other at their convenience. The correspondence is usually on the Moot Points, but, of course, may embrace other subjects, such as difficulties met with in reading, or in the course of business. The chief difficulty we find from communications from subscribers is in *opening* a correspondence. Our advice is that any party having had his name put down in our lists, should look at the Moot Points and Answers, and finding a name attached should forthwith write to one of the gentlemen respecting such Moot Point or Answer, giving his opinion thereon, or asking for information. Should there be no name affixed, let the party fix upon any one or more of the names of gentlemen in our lists, and address them thereon. We are confident that his communications will receive attention, particularly if he has, which he ought to do, taken the trouble to prepare for the discussion of the matter mooted.

When once the ice is broken, and it is seen that a continuance of the correspondence will be beneficial, there will be no difficulty as to the topics upon which future correspondence shall take place. It would be strange, indeed, if the Moot Points and Answers in the Magazine, the reading which each party must pursue, and the business transacted in the office, could not afford ample topics for correspondence and discussion.

Of course, it will happen that a correspondence commenced does not produce that satisfaction and progress which are so desirable, probably from the parties not being able to communicate any information, or from negligence, or indifference. In such cases it is easy to discontinue the correspondence, and to make trial in another direction.

LETTERS ON SIMPLE CONTRACTS.

[Continued from vol. vi., p. 11.]

Letter V.—*Of the value of £20—Documents under seal, and under hand—Several contracts—Incorporation of other agreements—Progressive duty—Proposals—Acknowledgments—Alterations in contracts—Agreements in foreign countries—Statute of Limitations—Unstamped agreements—Construction of Stamp Acts.*

Of the value of £20 or upwards.—The statutes do not impose an agreement stamp on every contract reduced into writing, even when the contract is not within any of the express exemptions, but only on contracts or agreements “where the matter thereof shall be of the value of £20 or upwards.” This provision, it will be remarked, does not come, like those which we have before considered, as an exemption out of some general enactment (in which case the onus would be on the party to show that his agreement came within the exception), but it is itself a substantive declaration that only agreements of the value of £20 or upwards require to be stamped, thus throwing the onus of showing that the subject-matter of the agreement is, or rather *was* at the time of its execution, of the value of £20 on the party objecting to it on the ground of the want of a stamp (see *Liddiard v. Gale*, 19 Law Journ. N.S. Exch. 160; *Lloyd v. Mansall*, *Id.* Q.B. 192). This is a point of real importance, even after taking into consideration the liberality with which, as we have seen, the courts construe exemptions, and should not be lost sight of by the student. The case of *Orford v. Cole* (2 Stark. 351) well illustrates these remarks. There an objection was taken to a letter to prove a contract of marriage being read because it was unstamped. The objection was overruled at the trial, and the plaintiff obtained a verdict. Upon the objection being renewed before the court in banc, Mr. J. Bayley said that the argument on the part of the defendant had proceeded on the supposition that the case, where the subject-matter of the contract is not of the value of £20, was an exception to the general clause; but it was not an exception, but a substantive part of the enactment, which was not to operate at all unless the matter of the agreement should be of the value of £20 or upwards. This supposed that the value of the contract was measureable in order to ascertain whether the subject-matter did or did not amount to £20; but a contract of marriage was of a different description (see also *Feltham v. Cartwright*, 7 Scott, 695; S.C. 5 Bing. N.C.

569). In the case just referred to it was decided that an agreement does not require a stamp, if it does not appear affirmatively that it relates to a matter amounting in value to £20 (see *Liddiard v. Gale*, 19 Law Journ. N.S. Exch. 160). And it is further to be remarked that where the consideration for an undertaking or promise does not amount to £20 in value, the written memorandum does not require to be stamped, and although the matter or thing to which it relates exceeds the value of £20, and the breach of the undertaking or promise may consequently give rise to a claim for damages beyond £20. The immediate object of the parties when they entered into the contract is to be regarded, and according as that is of less or of more value than £20, the agreement does not require or does require a stamp. Thus, where a wharfinger received fifteen chests of lac dye of the value of £600, upon the terms that he should for the usual wharfage ship them in a particular manner, and the dye having been lost by reason of his neglect, an action was brought against him to recover damages; a written memorandum whereby the wharfinger acknowledged the receipt of the chests and undertook to ship them four, in a ship was tendered in evidence, but was objected to, on the ground that the subject-matter thereof, the fifteen chests of lac dye, was of the value of £600, which amount the plaintiff sought to recover by his action, and that therefore the memorandum ought to have been stamped. It was, however, held that the matter of the agreement within the meaning of the Stamp Acts was the wharfage and charge on shipment, which the wharfinger was to receive as the consideration of his promise, and as this amounted to a few shillings only, the memorandum did not require a stamp (*Chadwick v. Sills*, R. and M. 15: see also *Ames v. Hill*, 2 Bos. & Pul. 150; *Melanotte v. Teasdale*, 13 Mees. and W. 216; *Taylor v. Steele*, 11 Jur. 806). In a case where the plaintiff agreed in writing with the defendant to do the brick work of a certain building for the sum of £1 14s. per rod, the defendant to find all materials, it was held that the agreement did not require a stamp, it not appearing at the time of making it that its value amounted to £20, though the work done ultimately exceeded that amount (*Liddiard v. Gale*, 4 Exch. Rep. 816; S.C. 19 Law Journ. N.S. Exch. 289). An agreement of reference of all matters in difference in a cause does not require a stamp when it does not appear that the matter of the agreement is of the value of £20 (*Lloyd v. Mansell*, 1 Pract. Rep. 130; S.C. 19 Law Journ. N.S. Q.B. 192).

Documents under seal.—It will be observed that both the 55 Geo. 3, c. 183, and the 13 & 14 Vic. c. 97, speak of agreements "*under hand only*," and consequently the agreement stamp is not applicable to agreements or contracts *under seal*, which must be stamped as *deeds*, i.e., with a deed stamp of £1 15s. besides progressive duty,

This is by virtue of the provision in the 55 Geo. 3, c. 183, to the following effect:—"Deeds of any kind whatever not otherwise charged in this schedule, nor expressly exempted from all stamp duty." And it is to be remarked that if the agreement under seal be in respect of any of the exemptions before mentioned, it must yet be stamped as a deed, for the exemptions are merely in respect of agreements under *hand* ONLY, and so a *deed* (which is under seal) is not exempted from duty. Thus, by way of example, if an agreement for the sale of goods were to be made under seal so as to be a deed, it must have a deed stamp (*per* Bayley, Just. in *Clayton v. Burtonshaw*, 5 Barn. and Cres. 45).

"*Under hand*."—The statute speaking (as above observed) of agreements under hand, it has been contended that an agreement signed by the plaintiff only does not come within the act, and so does not require to be stamped. But it has been decided in *Hughes v. Budd* (4 Jurist 654), that where the agreement is an essential part of the contract between the parties, it must be stamped though it is signed by one only of the parties. Still, where neither of the parties had signed the agreement, it certainly seemed at first sight to be a case not coming within the Stamp Acts, for such an agreement might reasonably be said not to be "*under hand*." But it is to be observed that the words are "*under hand only*," and the statutes evidently use those words to distinguish agreements not under seal from those which are of that solemn nature, and upon which are imposed a different duty. As was observed by Mr. J. Maule in the case presently referred to, if the act be looked at there can be little doubt that its proper construction is, that agreements not under seal are what are intended to be designated by the words "*under hand only*;" if that were not so, the whole object of the act would be defeated, and parties might derive all the benefit which arises from an agreement being reduced into writing, and avoid the stamp-duty, by merely omitting to sign it with their names. Accordingly it has been decided (*Chadwick v. Clarke*, 1 Com. Ben. Rep. 700; S.C. 9 Jurist, 539), that an agreement of demise, the terms of which have been assented to by the parties to it, *although it has not been signed by them*, is not admissible in evidence without being stamped.

In connection with the above cases and the doctrine established by them, it may be observed that Mr. Just. Erskine, in *Vaughton v. Brine* (1 Mann. and Gr. 364; 4 Jur. 464), said that the Stamp Act applied to such documents only as would be evidence against both the contracting parties; but it would seem, as Mr. B. Parke said in *Beeching v. Westbrook* (8 Mees. and W. 411), to be more correct to say that "the Stamp Act does not impose a stamp on every document which refers to, and so furnishes evidence to prove an agreement; it is required only on documents in which

parties put down the terms by which they intend to be mutually bound." The learned judge referred to this again in *Knight v. Barber* (10 Jur. 930 ; S.C. 16 Mees. and W. 66).

Several contracts on one piece of paper.—It sometimes happens that on the same piece of paper several contracts are to be found ; in such cases the rule is that each contract should have a separate stamp. Thus, where an agreement was made to trot two horses a certain distance in a given time, and subsequently an indorsement was made on the back doubling the amount betted, it was held that they were distinct contracts, and that each required a stamp (*Robson v. Hall*, 1 Peake, 127 ; see also *Doe v. Day*, 13 East, 246 ; *Bacon v. Simpson*, 3 Mees. and Wels. 78). In these cases there were in point of fact distinct contracts, but there may be various stipulations and engagements entered into at the same time by several persons, being the several parts of one contract, and together constituting one transaction ; in such case one stamp only is requisite (*R. v. Louth*, 8 Barn. and Cres. 247). Thus, where a debtor compounds with his creditors, and each creditor executes the same deed (as is usually the case) covenanting to give a further day for payment, or to take a certain sum as a composition, every covenant is in fact a separate covenant, and the several deed of each creditor who signs the deed, but the whole being one transaction, a separate stamp is never required (*per Mansfield, C.J.*, in *Bowen v. Ashley*, 1 New Cas. 278 ; see *Ramsbottom v. Davis*, 4 Mees. and Wels. 584).

Though where there are distinct contracts on one piece of paper, several stamps are, as above stated, required, yet a party may recover on one of the contracts if it be stamped, or the stamp on the paper can be appropriated to it, though the other contracts are not stamped. Thus, in the above case of *Robson v. Hall*, there being one stamp on the paper, and on the front part of it, it was held that the plaintiff might recover on the original wager, but not the double amount mentioned in the indorsement. Where there is but one stamp on a paper containing distinct contracts, its juxta-position to a particular contract, or other circumstances, may determine to which it is to be applied, but if it be doubtful to which agreement the stamp was intended to apply, none of the agreements can be received in evidence (*Doe v. Day*, 13 East, 241 ; *Shipton v. Thornton*, 9 Adol. and Ellis. 331 ; *Doe v. Fereday*, 12 *Id.* 27).

Where several parties enter into a contract which gives each a separate interest in some common subject-matter (as a subscription to some undertaking) one stamp is sufficient (*Davies v. Williams*, 13 East, 232). And this doctrine has been extended to the case of several persons jointly conveying their separate interests in certain shares of an incorporated company, one *ad valorem* stamp being held sufficient (*Wills v. Bridge*, 4 Exch. Rep. 93).

Incorporation of other agreements. — Progressive duty. — In counting the number of words of an agreement for the purpose of ascertaining whether it requires a progressive duty, the statute requires that "every schedule, receipt, or other matter put or indorsed thereon, or annexed thereto," should be included. On the 55 Geo. 3, c. 184, the words of which are similar to the 13 & 14 Vict. c. 97 (*suprà*, p. 4) it was held that the stamp on an agreement which incorporates by *reference* a clause in a former one (duly stamped) is properly regulated by the quantity of words in the second agreement only; and that the clause referred to was not to be counted (*Atwood v. Small*, 7 Barn. and Cres. 390; *Weedon v. Woodbridge*, 13 Jur. 630, note); and the indorsement on the former document does not affect the stamp thereof, as such a subsequent indorsement is not such an one as the stamp acts contemplated (*Ibid*). These decisions were followed by that of the Fishmongers' Co. v. Dimsdale (16 Jurist, 799), where a short memorandum, stamped as such, was indorsed on a previous agreement between the parties, and by such memorandum the whole terms of the agreement were explained, and their operation limited in point of liability and time; on an objection that the memorandum should have been stamped according to its own length and that of the agreement, it was held in the Exchequer Chamber that a memorandum was a distinct agreement, and so sufficiently stamped without counting the agreement on which it was indorsed. Also, that if it had incorporated the agreement on which it was indorsed, the number of words in such agreement was, according to the two cases above referred to, immaterial, and that then it was a case not exactly met by the Stamp Act. The Legislature has adopted these decisions both retrospectively and prospectively by the 13 & 14 Vict. c. 97, sec. 11 of which, after reciting that "by the several acts now in force relating to the stamp duties, as well as by this act, certain stamp duties, called progressive duties, are imposed upon deeds and instruments in respect of certain quantities of words contained therein, together with any schedule, receipt, or other matter put or indorsed thereon or annexed thereto: and whereas doubts are entertained whether such progressive duties are chargeable on any deed or instrument in respect of the words contained in any other deed or instrument liable to stamp duty, *and duly stamped*, which may be put or indorsed upon, or annexed to, or referred to in or by such first mentioned deed or instrument, and it is expedient to remove such doubts," declares and enacts "that the same progressive duties shall not be deemed or held to be, or to have been imposed or chargeable upon any deed or instrument, in respect of the words, or any quantity of the words contained in any other deed or instrument liable to stamp duty, *and duly stamped*, which may be, or may have been put or indorsed

upon, or annexed to such first mentioned deed or instrument, or which may be, or may have been in any manner incorporated with or referred to in or by the same."

Proposals.—It is not every writing relating to the transactions between the parties which requires a stamp: as Mr. B. Parke observed in *Beeching v. Westbrook* (8 Mees. and W. 411), "a stamp is not imposed by the act upon every document which it refers to, and so furnishes evidence to prove an agreement; it is required only on documents in which the parties put down the terms by which they intend to be *mutually* bound." It is well established that an agreement not binding *per se* on the parties need not be stamped (*per Patteson, J.* in *R. v. St. Martin's*, 2 Adol. and Ell. 210; see 1 Scott, N. R. 258). Thus, a mere proposal or offer in writing by one of the parties, though the other party should agree to the terms, and the transaction be concluded between them accordingly, does not require to be stamped. In such cases it is at first uncertain whether or not the written proposal will be accepted by either party, and it is therefore the subsequent oral agreement which forms the binding contract (see *Drant v. Brown*, 3 Barn. and Cres. 665; *Vollans v. Fletcher*, 11 Jur. 416; *Hudspeth v. Yarnold*, 14 Jur. 578; *Shackell v. Roasier*, 2 New Cas. 640). In a very recent case, which was an action by a schoolmaster for a sum of money in lieu of three months' notice of the removal of the appellant's (the defendant's) sons from school, it appeared that the appellant's agent, having expressed a wish to place the appellant's sons under the respondent's (the plaintiff's) care, received from the latter a prospectus, which stated that the terms were sixty guineas per annum, and that three months' notice or payment was required previously to the removal of the pupil. The respondent, at the time of delivering the prospectus, agreed, verbally, that the boys should be charged for at the rate of fifty guineas per annum each. The boys were thereupon sent to the respondent's, and were taken away without the stipulated notice. It was held that the prospectus was a proposal and not an agreement, and that no stamp was necessary (Clay, app., Crofts, resp.; 20 Law Journ. N. S. Exch. 361).

Somewhat analogous to cases of proposals, are entries in the books of public companies of resolutions of the directors for the employment of the officers of, or the supply of goods, &c. to the company. There have been held not to be agreements or minutes of agreement requiring a stamp (*Vaughton v. Brine*, 1 Scott, N. R. 258; S.C. 4 Jur. 464). As *Tindal, C. J.*, there observed, such a resolution is either a proposal for an agreement before it is made, or an admission after it is made; in neither case does it require a stamp. (See also *Lucas v. Beach*, 1 Scott, 350).

Acknowledgments.—Admissions.—As before seen, the words of the

Stamp Act are "agreements, whether the same shall be only evidence of a contract, or obligatory upon the parties from its being a written agreement." Notwithstanding these words of the act, it is established that an acknowledgment, though evidence of a contract between the parties as a subsequent admission, does not require a stamp, the real contract of which the acknowledgment is evidence having been before complete. It is also established that a memorandum of acknowledgment, which only expresses the same promise or consequence which the law would imply from the acknowledgment, does not require a stamp. These observations will account for the decision in the following case, which was an action of assumpsit on a special agreement, whereby plaintiff, for certain considerations, was to pay defendant a sum of money and accept a bill of exchange at eighteen months, and deliver the same to defendant, the bill to be on certain conditions null and void; and defendant promised that if he should negotiate the bill, and the conditions should be fulfilled, he would indemnify plaintiff against the bill. Averments that the bill was deposited on the terms that the conditions were fulfilled, and the bill became null and void. Breach, that defendant did not indemnify plaintiff. Pleas, *non assumpsit*, and a traverse of the averment that the bill was deposited on these terms. On the trial the plaintiff gave oral evidence which showed that there was an agreement between plaintiff and defendant, but failed in showing its terms. He then produced a paper signed by defendant, dated after the parol agreement, in these words, "I have this day received from plaintiff a bill for £27 10s. at eighteen months' date, on condition that if," &c. (stating the conditions in the declaration, but not the rest of the agreement), the bill to be null and void; it was held that this paper did not require a stamp (*De Porquet v. Page*, 15 Q.B. 1073; S.C. 15 Jur. 148).

Where a paper purports to be a receipt, and as such requires a stamp, and also purports to be an agreed statement of accounts, and as such not requiring a stamp, it may be given in evidence to show the agreed state of accounts only (but not to show the fact of payment) though it does not bear a stamp as a receipt (*Matheson v. Ross*, Ho. Lords Cas. 286; S.C. 13 Jur. 307).

Alteration in contract.—Where an agreement has been completed by the parties and duly stamped, the stamp, which is thereby become *functus officio*, cannot be used a second time for another instrument, and the insertion of material terms after the agreement has become operative, is, in effect, a new agreement, and requires a fresh stamp. But the subsequent alteration of a written agreement in a point *not* material (being for the purpose of making the agreement conformable to the original terms agreed on) made by consent of all parties, does not render a fresh stamp necessary (see *Spicer v. Bar-*

gess, 1 Cr. Mees. and Rosc. 129; *Cole v. Parkin*, 12 East, 471). Indeed, as Mr. Just. Erle said in the case of *Fishmongers' Co. v. Dimsdale* (16 Jur. 800), the principle is that if subsequent additions, though made by indorsement, were within the original contemplation of the parties, it is only one agreement.

Agreements executed in foreign countries.—Ever since the time of Lord Hardwicke it has been considered as settled that an English court of justice cannot take notice of the revenue laws of a foreign state. It would be productive of great inconvenience if, in every case in which an instrument was executed in a foreign country, the courts in England were to receive in evidence what the law of that country was in order to ascertain whether the instrument was or was not valid (*per* Abbot, C. J., in *Jones v. Catherwood*, 3 Dowl. and Ryl. 190; *per* Ld. Mansfield, in *Holman v. Johnson*, Cowper, 343). It may, therefore, be considered to be fully established that a document will not be rejected as evidence on the ground that it has not been stamped in the manner required by the law of a foreign country. Still, it is clearly laid down that where the law of a foreign country renders a contract *invalid* unless stamped in a particular way, a contract not so stamped cannot be enforced in the English courts (*Bristowe v. Secqueville*, 14 Jur. 764; S.C. 19 Law Journ. N.S. Excheq. 289; explaining the report of *Alves v. Hodgson*, 7 Term Rep. 241).

Statute of Limitations.—The 9 Geo. 4, c. 14, s. 8, exempts from stamp duty any agreement made necessary by that act to avoid the Statute of Limitations. Under this enactment it has been held that a qualified promise to pay, put in evidence not to prove the debt, but to rebut the Statute of Limitations, is exempt from stamp-duty (*Norris v. Dixon*, 4 Adol. and Ellis, 845). Such an acknowledgment must, when given in evidence, be strictly confined to the purpose of taking the case out of the Statute of Limitations, and cannot be received as evidence of the contract upon which the debt originated. And where parties mean to make an instrument solely to prevent the operation of the Statute of Limitations, they must take care not to import into it terms which will make it liable to stamp-duty as a promissory note, for a promissory note which is void for want of a proper stamp cannot be used as an acknowledgment under the above statute (*Jones v. Ryder*, 4 Mees. and Wels. 32).

Unstamped agreement used for collateral purposes.—As we have already seen, the various Stamp Acts provide that no document liable to be stamped shall be pleaded or given in evidence in any court of law or of equity unless the same be duly stamped. Where, however, an unstamped document is tendered in evidence, not for the purpose of establishing the fact contained in it, or to enforce its performance, but in order to prove or establish some collateral fact, the

courts will admit it. In civil cases this is frequently done, and the later cases have carried the doctrine farther than the earlier ones did. It is not necessary for our present purpose to enter at large into this subject, inasmuch as it is a matter necessarily distinct from the enforcement of a contract as such. The reader, however, will do well to consult the following recent cases:—*Matheson v. Ross*, 2 House of Lords Cases, 286; 13 Jur. 307; *Holmes v. Sixsmith*, 21 Law Journ. N.S. 312; S.C. 16 Jur. 619; *Rex v. Gompertz*, 11 Jur. 204; *Phillips v. Higgins*, 20 Law Journ. N.S. Q.B. 357.

Unstamped document—Restraining party from objecting.—The courts formerly, under special circumstances, as where the party applying had been prevented by the opposite party from having the original instrument stamped at the time of its execution, and the instrument is not in the applicant's possession, on making an order to produce a copy of the instrument to be stamped, went on to direct that if the party produced at the trial that copy stamped, the opposite party should be precluded from producing the unstamped original (see *Bousefield v. Godfrey*, 5 Bing. 418; *Goodliff v. Fuller*, 14 Mees. and W. 4). This power, however, was a very questionable one, and has been now repudiated. Thus, the Court of Queen's Bench have decided that in an action founded upon a document in which both parties have an interest, and which was in the possession of one, but is said by him to have been lost, a judge cannot order that if such party does not produce the document to be stamped, a copy, duly stamped, shall be read in evidence at the trial, and that the original shall not be produced on the other side, nor objection taken to the want of a stamp on the original. The court rescinded such an order after it had been enforced by the judge at *nisi prius*, and made a rule of court (*Rankin v. Hamilton*, 15 Qu. Ben. Rep. 187; see *Phillips v. Higgins*, 2 Pract. Rep. 355; S.C. 20 Law Journ. N.S. Q.B. 235).

Construction of Stamp Acts.—We may just mention that the courts put a liberal construction on the Stamp Acts, as they impose a heavy burden on the subject, which is not to be done by implication on too rigid a construction; it must be clear that the Legislature intended to charge the instrument in question (*Denn v. Diamond*, 4 Barn. and Cres. 243; *Tomkins v. Ashby*, 6 Barn. and Cres. 541), or, as Mr. Baron Parke said in *Fishmongers' Co. v. Dimsdale* (16 Jur. 401), the words of the Stamp Act must be very clear for the imposition of a charge upon the subject (*Wroughton v. Turton*, 11 Mees. and W. 567). Words of exemption are to be largely expounded (*Warrington v. Furber*, 8 East, 242). If parties choose to divide their contracts so as to lessen the amount of stamps, they may legally do so (*Hawkins v. Clutterbuck*, 2 Car. and Kir. 810 Dart, 283, 2nd edit.)

QUESTIONS ON LETTER V.

1. Do the Stamp Acts require agreements of the value of £20 and upwards to be put into writing ?

2. Can the party to a written unstamped agreement recover on it by any and what means ?

3. Where it appears at a trial that there is a written contract respecting the matters in dispute, must it be produced stamped ?

4. What are the principal statutes relating to stamps ?

5. What are the provisions of the 13 & 14 Vic. c. 97 as to stamps on agreements ?

6. State what agreements are exempted from stamp-duty.

7. Does an agreement for the hire of a labourer, artificer, or common servant require a stamp ?

8. Does an agreement relating to the sale of goods, wares, or merchandise, require a stamp ?

9. If, besides the sale of goods, the agreement cancel a previous contract, will it require a stamp ?

10. Must the sale of goods be the only object of the agreement, or will it suffice if it be the primary object ?

11. Must money pass on the sale of the goods, or will it suffice if a previous debt is to be cancelled ?

12. Are guarantees for the payment of the price of goods sold exempted from stamp-duty ?

In case a contract respecting goods should also relate to other matters, would the contract be exempt from stamp-duty ?

Are any and what stamps required on contracts relating to fixtures ?

Are executory contracts respecting goods within the exemption of the Stamp Acts ?

Must a written contract for the future manufacture and supply of goods within the 9 Geo. 4, c. 14 (Stat. of Frauds Extension Act) be stamped ?

Where several letters are offered in evidence to prove a contract, must they all be stamped ?

Are any and what letters specially exempted from stamp-duty ?

What must be the value of the consideration of an agreement to require a stamp ?

Is the value at the time of the making of the contract to be considered, or at any and what other time ?

Would a contract of marriage require a stamp ?

Is the value of the consideration or of the subject-matter of the contract to be considered in ascertaining whether or not a stamp is required ?

Supposing a contract relating to goods were under seal, would it require a stamp ?

Do the provisions as to stamps on agreements apply to contracts under seal, or what stamp do they require?

If an agreement should be signed by one of the parties only, would it require a stamp?

Does an agreement not signed by either party require a stamp?

What is the real meaning of the expression in the Stamp Acts of agreements, "under hand only?"

On what documents do the stamp acts require an agreement stamp to be affixed?

If several contracts be written on the same piece of paper, will one stamp suffice?

In such case is there any and what circumstance which will entitle a party to recover on one of the contracts, though the others be unstamped?

Where several parties join in one contract respecting a matter in which they have several interests, will one stamp suffice?

Is any and what progressive duty payable in respect of a document incorporated with the agreement by reference?

If an agreement be indorsed on another duly stamped instrument, will it be necessary to count the words of the original instrument in order to ascertain the proper stamp?

Will an agreement, not signed by the parties, and not being binding on them *per se*, require a stamp?

Will a proposal afterwards accepted require a stamp?

Does a resolution of a public company, entered in their books, to employ a party or to purchase goods, require to be stamped?

Does a mere acknowledgment, operating as an admission of a contract, require a stamp?

Suppose the acknowledgment should express in words the same promise or consequence which the law would imply from the mere acknowledgment, would a stamp be required?

Where a paper purports to be an agreed statement of accounts and also a receipt, can it be used without a stamp?

Where an alteration is made in an agreement, is a new stamp required?

Will English courts take notice of the revenue laws of foreign states?

Will a document be rejected in an English court because it is not stamped, as required by the law of the foreign country where it was made?

If, by the law of a foreign country the contract is invalid, unless stamped in a particular way, can it be enforced here if not so stamped?

Must an acknowledgment under the Statute of Limitations be stamped?

Can an unstamped document be used for any and what purposes
Will the courts restrain a party from objecting to the want of a stamp on a document?

Do the courts construe the Stamp Acts liberally in favour of non-liability?

QUESTIONS AND ANSWERS

ON THE

NEW EQUITY PRACTICE.

[Continued from p. 32.]

Sales in Foreclosure Suits—Misjoinder—Revivor—Declaratory Decree—Partial Relief—Abatement of Suits—Supplemental Matter—Special Directions as to taking Accounts—Sales of Real Estate—Income of Real Property—Injunctions—Cases, &c. to Courts of Law.

SALES IN FORECLOSURE SUITS.

Have the courts of equity any and what power to direct a sale in suits for foreclosure of mortgages?

The courts may, in any such suits, upon a request of the mortgagee, or of any subsequent incumbrancer, or of the mortgagor, or any person claiming under them respectively, direct a sale of the mortgaged property, instead of a foreclosure of the equity of redemption on such terms as the court may direct, and, if thought fit, without previously determining the priorities of incumbrances, or giving the usual or any time to redeem (c. 86, s. 48).

NOTE.—The courts do not act on the above provision as a matter of course, and they will not order a sale in a foreclosure suit unless there is such complication that the common decree for foreclosure cannot be conveniently worked (*Hiorns v. Holton*, 16 Jur. 1077; *Roberts v. Price*, 21 Law Tim. 209). Where a sale is directed under the above section, it is not for an immediate sale, unless the defendant consents, but a day is named for payment, and, on default of payment at that time, the sale is directed (*Smith v. Robinson*, 20 Law Tim. 205).

If the request for sale be made by any subsequent incumbrancer, or the mortgagor, or by any one claiming under them, will the sale be made as a matter of course?

No; for the consent of the mortgagee or the persons claiming

under him must be obtained, or the party making such request must deposit in court a reasonable sum of money, to be fixed by the court, for the purpose of securing the performance of such terms as the court may think fit to impose on the party making such request (c. 86, s. 48).

MISJOINDER—REVIVOR.

Where there is a misjoinder of plaintiffs, and the plaintiff having an interest shall have died, leaving a plaintiff without an interest on the record, what may be done?

In such case the court may, at the hearing of the cause, order the cause to stand revived, as may appear just, and proceed to a decision of the cause, if it shall see fit, and give such directions as to costs or otherwise as may appear just and expedient (c. 86, s. 49).

NOTE.—See as to misjoinder, vol. 5, N. S. p. 677.

DECLARATORY DECREE—PARTIAL RELIEF.

It was a well-established rule of equity that the court could not make a merely declaratory decree without administering relief, or decree a partial execution of trusts; the object of the court was to make such a decree as would prevent any future litigation by any person having an interest in the property. By Sir Geo. Turner's Act (the 13 & 14 Vict. c. 35, stated 2 Mag. N. S. 227-232) the courts indeed were enabled to make a declaratory decree, but this could only be done where the parties agreed on a special case [see 5 Mag. N. S. 677, for the new enactments, which are here again referred to on account of their importance].

Will courts of equity make a merely declaratory decree?

Yes, they will make binding declarations of right without granting consequential relief (c. 86, s. 50; 5 Mag. N. S. p. 677).

Will courts of equity adjudicate between parties without requiring the whole trusts and purposes of the deed, will, or other instrument, to be executed under the direction of the court?

Yes, and that without taking the accounts of the trustees or other accounting parties, or ascertaining the particulars or amount of the property touching which the question or questions may have arisen (c. 86, s. 51; 5 Mag. N. S. p. 677).

ABATEMENT OF SUITS.

[The death of any material party to the suit where his interest passes to his representatives, or the marriage of a feme sole plaintiff, abates the suit. So the bankruptcy or insolvency of a material party renders the suit defective. In such cases a bill of revivor or a supplemental bill became necessary (see Pract. Eq. pp. 253, 254, 399—640). The 15 & 16 Vic. c. 86, s. 52, dispenses with the

necessity for bills of revivor or of supplement, and substitutes a cheaper and more expeditious proceeding by an order of course.]

Where a suit becomes abated by death, marriage, or otherwise, or defective by reason of some change or transmission of interest or liability, how may such suit be revived or be carried on?

In lieu of exhibiting a bill of revivor or supplemental bill, an order to the effect of the usual order to revive, or the usual supplemental decree, may be obtained as of course, upon an allegation of the abatement of the suit, or of the same having become defective, and of the change or transmission of interest or liability (c. 86, s. 52).

NOTE.—A difficulty arises on the above section, where it is sought to revive a suit against the representatives of a deceased defendant. In such a case formerly the bill of revivor or supplemental bill interrogated the defendants to obtain an admission of assets. If the defendants admitted assets, the cause proceeded against them on an order to revive only, but if that admission were not made the cause must have been heard for the purpose of obtaining the necessary accounts of the estate of the deceased defendant, to answer the demands made against it by the suit. In fact, the bill prayed not only that the suit might be revived, but that, in case the defendants should not admit assets to answer the purposes of the suit, those accounts might be taken, and so far the bill was in the nature of an original bill (see 2 Dan. Pract. 1420, 2nd edit.) Now, the 52nd sec. of the act does not contain any provision for obtaining an admission of assets, and the Master of the Rolls has refused to allow a clause to be added to the order to revive, to the effect that if the representatives did not admit assets of their testator, the usual accounts might be taken against them. His Honour observed that the plaintiff must proceed against such representatives as if they had been originally parties to the suit (*Ely v. Waddelow*, 20 Law Tim. 256). It should seem from this decision, and that in *Heath v. Chapman* (17 Jur. 570), that in such cases the plaintiff should file a supplemental bill as heretofore. Since the above was written the case of *Hart v. Tulk* (22 Law Tim. 192) has been brought before the Lord Chancellor. There a defendant had died *after* a decree had been made in the cause, and he devised his interest in the suit to his wife and children. The Lord Chancellor held that the proper course, in order to bring the devisees before the court, was to file a statement, in the nature of supplemental matter, under sec. 53 of the act, and the Ord. of 7th Aug. 1852, pl. 44 (see *post*), and then to obtain a supplemental decree as of course. This, probably, will be the proceeding to be taken against the personal representatives of the party to a suit. It has been decided by the Lords Justices (overruling the doubt of *Stuart, V. C.*) that in an administration-suit, by the testator's executors and trustees, on the death of the sole plaintiff

(whose interest determined on his death) an order to the effect of the usual supplemental decree under the above 52nd section may be made on behalf of a creditor not a party to the suit, but found to be a creditor by the Master's report, he having served the parties who, had a supplemental bill been filed, would have been defendants, with notice of the application, and they not having appeared (*Lowes v. Lowes*, 20 Law Tim. 196; S.C. 16 Jur. 991). The assignee of one of several plaintiffs in an administration-suit has been allowed to revive under the above 52nd section (*Wastell v. Lealie*, 20 Law Tim. 243). As to the death of an official assignee in bankruptcy, and the substitution of his successor, see *Gordon v. Jesson*, 20 Law Tim. 231.

NOTE.—The time for the defendant to appear is eight days after the service of the order to revive. In default of such appearance the defendant formerly became liable to the ordinary process of contempt, but in lieu thereof the plaintiff might and usually did enter an appearance for the defendant (2 Daniel, 1421, 2nd edit.; Pract. Equity, p. 404). It appears that now an order for leave to enter an appearance for the defendant is required (see *Cross v. Thomas*, 17 Jur. 336; S.C. 21 Law Tim. 2). So, also, where an order has been made for substituted service of the order to revive (*Forster v. Menzies*, 21 Law Tim. 123; S.C. 17 Jur. 657). However, if a defendant should not enter an appearance within the eight days, and does not apply within the period prescribed by the Ord. of 7th Aug. 1852, i.e., within twelve days after service of the order to revive, it will not be necessary for the plaintiff to enter an appearance for the defendant. At least such was the opinion of V. C. Stuart in the case of *Hanbury v. Ward* (22 Law Tim. 183). There a defendant, upon whom an order to revive under the above section had been served, did not enter an appearance within eight days, or apply to have the order discharged within the twelve days allowed by the order of Aug. 1852. He appeared, however, by counsel on further directions. An application was afterwards made to the V.C. by the plaintiff for leave to enter an appearance for the defendant, *nunc pro tunc*, which was refused, on the ground that the order to revive had become absolute, and that, therefore, an appearance for the defendant was unnecessary.

If a party served with an order to revive, &c., be under any disability, not being coverture, what must be done to render it effectual?

A guardian *ad litem* must be appointed for a party under such disability, and until this is done, and, indeed, until twelve days thereafter, the order to revive or to carry on the proceedings will be of no force or effect as against such person (c. 86, s. 52; Ord. of 7th Aug. 1852, pl. 43).

What is the effect of an order to revive or to continue a suit?

On its service on the party or parties who would formerly have been defendant or defendants to a bill of revivor or supplemental bill, the order will be binding on such party or parties in the same manner as if obtained after such bills. And such party or parties thereby become a party or parties to the suit, and must appear thereto within such time and in like manner as if he or they had been duly served with process to appear to a bill of revivor or supplemental bill (c. 86, s. 52).

Can the party served with an order to revive or to proceed apply, when, and how, to discharge same, and on what grounds?

The party served with such an order may, within twelve days after service thereof, if under no disability except coverture, or if under any other disability, then within the same time after the appointment of a guardian *ad litem* for him, apply to the court either by motion or by petition to discharge such order on any ground which would have been open to him on a bill of revivor or supplemental bill (c. 86, s. 52; Ord. of 7th Aug. 1852, pl. 43).

SUPPLEMENTAL MATTER.

[We have before, vol. v., p. 684, referred to the provisions of sec. 53 of the 15 & 16 Vict. c. 86, as to introducing by amendment matter arising subsequently to the filing of the bill, and therefore only a short statement of the provisions of that section, and of the rule of court thereon, will be here necessary.]

Is it necessary to file a supplemental bill for the purpose only of stating or putting in issue facts or circumstances occurring after the institution of a suit?

No, but such facts or circumstances may be introduced into the original bill by way of amendment, if the cause is in a state to allow thereof (c. 86, s. 53; 5 Mag. N.S. p. 684).

If the cause is not in such a state as to allow of an amendment, adding new matter, being made in the bill, how is such new matter to be stated?

In such case the plaintiff may state the facts or circumstances occurring after the institution of the suit, by filing a statement, either written or printed, to be annexed to the bill. Such proceedings, by way of answer, evidence, and otherwise, are to be had, as if the statement were embodied in a supplemental bill, but the proceedings may, by order of the court, be accelerated (c. 86, s. 53; Ord. of 7 Aug. 1852, pl. 44).

NOTE.—It has been held that a petition to the court is within the above 53rd section. Therefore, where a female petitioner had married after the filing and stamping of the petition, the petition was allowed to be amended, by making it the petition of the husband and wife; the amended petition, however, was held to require a fresh stamp (*Robinson v. Hewitson*, 20 Law Tim. 154).

SPECIAL DIRECTIONS AS TO TAKING ACCOUNTS.

Is a court of equity empowered where an account is required to be taken, to give special directions as the mode of taking the same, and how and when may the same be done?

A court of equity may give such special directions, and that either by the decree or order directing the account, or by any subsequent order, upon its appearing to the court that the circumstances of the case are such as to require such special directions (c. 86, s. 54).

NOTE.—By sect 42 of the 15 & 16 Vict. c. 80, the court may call in the assistance of accountants and merchants, and act upon their certificate.

Where accounts are required to be taken, may the court give any, and what directions as to books of account being received as evidence?

The court may direct that in taking the accounts the books of account in which the accounts required to be taken have been kept, or any of them, shall be taken as *prima facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised (c. 86, s. 54).

NOTE.—See as to cases before the act (*Lodge v. Prichard*, 20 Law Tim. 274):

SALES OF REAL ESTATE.

Can the court direct a sale of real estate, the subject of a suit, before decree, in any, and what case?

Yes, where it appears to the court that it will be necessary or expedient that such real estate should be sold for the purposes of the suit. Such sale is to be as valid to all intents and purposes as if directed by a decree made on the hearing of the cause (c. 86, s. 55).

NOTE.—In the case of *Prince v. Cooper* (20 Law Tim. 269) the Master of the Rolls observed that the above section was intended to apply to cases where, for the protection of the property, or for any other cause, it was necessary to come to the court for an order for a sale; but that it did not extend to enable any party in a contested suit, upon an application for sale, to obtain a decision of the questions in the cause before the hearing. In an administration suit, where the usual preliminary inquiries have been directed and made, an order for sale may, under the above section, be obtained, in order to avoid the expense of a hearing on further directions (*Gladwin v. Gladwin*, 21 Law Tim. 98).

If any party to the suit be in possession of the estate directed to be sold, or in receipt of the rents and profits thereof, what will he be directed to do?

He will be directed to deliver up possession or receipt to the

purchaser or such other person as the court shall direct (c. 86, s. 55).

What is required to be done before any estate or interest is put up for sale under a decree or order of the court?

An abstract of the title to such estate or interest must, with the approbation of the court, be laid before one of the conveyancing counsel of the court, for the opinion of such counsel thereon to the intent that the said court may be the better enabled to give such direction as may be necessary respecting the conditions of sale of such estate or interest, and other matters connected with the sale thereof (c. 86, s. 56).

NOTE.—The Lord Chancellor has appointed six conveyancing counsel for the above and other similar purposes (see 15 & 16 Vict. c. 80, s. 41).

What is required to be stated in the conditions of sale on a sale directed by the court?

A time for the delivery to the purchaser of the abstract of title to the estate or other interest (c. 86, s. 56).

INCOME OF PROPERTY.

Has the court power, without any report, to allow to the parties interested in the property in dispute the income thereof?

Yes, where the court is satisfied that the property, the subject of the proceedings, will be more than sufficient to answer all the claims thereon which ought to be provided for in such suit (c. 86, s. 57).

What allowance is to be made, and to whom?

The allowance is to be of the whole or part of the annual income of the real property, or a part of the personal property, or a part, or the whole of the income thereof. It is to be made to the parties interested in the property, or to any one or more of them, and to be paid up to such time as the court shall direct (c. 86, s. 57).

INJUNCTIONS.

Formerly where an action was pending at law, the defendant therein might, on filing a bill in equity, obtain as of course, if the defendant to the bill (the plaintiff at law) did not appear therein in due time, or answer the same within eight days after appearance, an injunction to stay the proceedings at law. This facility no longer exists, for now the plaintiff in the suit must apply to the court for the injunction, and show circumstances to entitle him to it. Still, it appears that the judges in equity conceive that where the defendant does not in due time answer the interrogatories filed by the plaintiff, the plaintiff is entitled, upon merely verifying his bill, and showing a *prima facie* case, to an injunction, until answer or further order, which is in effect until the defendant puts in an answer, and obtains an order to dissolve. The injunction will, it appears, be granted in such a case, though the defendant has filed

affidavits sufficient to displace the case made by the bill; for it is possible that new facts may be brought out, and full discovery made by the answer (*Senior v. Prichard*, 20 Law Tim. 243).]

How is an injunction to stay proceedings at law obtained?

By an interlocutory application to the court, supported by affidavit, in the same manner as in the case of special injunctions (c. 86, s. 58; Ord. of 7th Aug. 1852, pl. 45).

NOTE.—The court will not grant an injunction to stay proceedings at law unless the plaintiff have filed interrogatories to his bill, for without such interrogatories a defendant is not called on to answer anything, and is not, therefore, in any default (*Lovell v. Galloway*, 20 Law Tim. 231).

NOTE.—The meaning of the above provision is that the injunction must be moved for upon notice; and, for this reason, the courts will now allow substituted service of a bill for the common injunction on an affidavit that the plaintiff at law is out of the jurisdiction, and that the person whom it is intended to serve is his attorney, without any affidavit of merits, which formerly would have been necessary (*Sergison v. Beavan*, 17 Jur. 1111).

Will an injunction to stay proceedings at law be granted as of course for default of appearance or answer to the bill?

No; the Ord. of 7th Aug. 1852, pl. 45, expressly providing that no injunction for stay of proceedings at law is to be granted as of course for default of appearance or answer to the bill.

NOTE.—It has been before stated that an injunction is still granted for default of answer, but this is not done, as formerly, *ex parte* and as of course, but only on motion with notice (*Senior v. Prichard*, 20 Law Tim. 243).

How is the answer of a defendant regarded in motions for an injunction or to dissolve one?

The answer of the defendant is, for the purpose of evidence on such motions, to be regarded merely as an affidavit of the defendant, and affidavits may be received and read in opposition thereto (c. 86, s. 59).

NOTE.—It may be observed that under sec. 40 of the 15 & 16 Vict., c. 86 (*ante*, p. 31), where, on a motion for an injunction, the plaintiff files an affidavit, the court will, at the instance of the defendant, before the motion is proceeded with, and even before the defendant has filed his affidavits, direct the deponent to attend before the examiner for cross-examination, that course being in accordance with the object of the statute (*Besemeres v. Besemeres*, 22 Law Tim. 197).

CASES, &c., TO COURTS OF LAW.

Has a court of equity power to direct a case to be stated for the opinion of a court of law?

No, the court of equity has itself full power to determine any questions of law, which, in the judgment of such court, shall be necessary to be decided previously to the decision of the equitable question at issue between the parties (c. 86, s. 61).

NOTE.—The above section refers only to those cases where the question is one merely of law, not to a mixed question of law and fact. It is to be observed, however, that it clearly takes away the right to send a special case for the opinion of a court of common law; but it leaves a case of law and fact to be dealt with under the next section, or according to the old practice of an *issue*.

Do courts of equity now decline to grant equitable relief until the legal title or right of the party seeking relief is established at law?

No, for a court of equity is now enabled to determine itself such title or right without requiring the parties to proceed at law to establish the same (c. 86, s. 62).

NOTE.—It is understood that the equity judges feel a difficulty in acting under the above provision in the ordinary cases of injunction, which, however, it might be thought the Legislature had principally in view. It certainly is not compulsory on the courts of equity to decide the legal title or right in question between the parties, but it could scarcely have been the intention of the framers of the act that the courts of equity should still continue the old practice, or, as they do now, call upon the plaintiff to try his right in a court of law, before they will grant him such interlocutory relief as an injunction. The judges, indeed, say the Legislature have created the difficulty by enacting that the court of equity may *determine* the legal right, so that if the court acts on the section on a mere motion its decision would be binding on the parties, and also on co-ordinate courts, until revised on appeal.

DEBATING SOCIETIES.

LAW STUDENTS' MUTUAL CORRESPONDING SOCIETY (vol. v., p. 705).

We have at various times called attention to the above society, and we are happy to hear that, though not very long established, it has met with support, though certainly not to the extent which it deserves. The originators need not, however, despair of eventual success, and they may take our word for it that nothing is to be done with articulated clerks without great exertion and the exercise of much patience. It little boots that something really useful is placed before them; they seem at first unmoved by it, and it is only after much persuasion

and a great lapse of time that they can be induced to give their countenance and support to any, even the most palpably useful undertaking. The following statement of the moot points either now being or very recently discussed by the society, will, probably, satisfy our readers as to the value of the society better than any recommendatory notice from us.

Moot Point, No. 38. A. and B. have premises contiguous to each other. A. had a window looking upon B.'s premises, and has recently enlarged the same to the annoyance of A. Can A. place a larger window in his premises than the one originally there, or in other words, do not A.'s proceedings render him liable to an action?

No. 41. Is an assignment of property by a nun in pursuance of a vow made on entering a convent void?

No. 42. A testator, by his codicil dated in 1839, directed that certain freehold property should go to his son William in the event of John dying without issue, or before attaining the age of twenty-one. John attained twenty-one. Did John take a fee simple, and could he make out a good title as vendor?

No. 43. A., after bequeathing a sum of long annuities to his wife, gave the capital after her death to B., if he should be living at her decease, and if not, to B.'s son. B. outlived the wife, but died in the testator's lifetime. Does the legacy lapse?

No. 46. A. claims as winner the whole of the stakes deposited on an illegal wager. Can he recover back his own stake as money received to his use by the stakeholder?

No. 48. A feme covert is in possession of leasehold property in her own right, and is anxious to lease them to C. for a term of years, for which purpose A.'s husband joins in executing the lease to C. In the event of A.'s decease, would the rent be payable to A.'s executors or to the husband?

No. 49. By the settlement made on the marriage of A. with B., terms of 500 and 1,000 years respectively are limited to take effect on the death of the survivor of A. and B. for the purpose of charging and raising the sums of £800 and £1,400 on the settled estates for the portions of younger children of the marriage. A. is dead. Can C. (a younger child of the marriage, who has attained twenty-one, and is married) effectually alienate her interest under the settlement during the lifetime of B., the tenant for life of the estates, and should the deed be acknowledged?

No. 50. In 1823 A. sold property to B., but on account of the defective state of A.'s title, B. refused to complete, and a settlement was not effected until 1828, when A. conveyed the property to B., entered into covenants for title, and also executed a bond, binding himself in the penal sum of £1,200 to indemnify B. from any damage

he might sustain on account of the defective state of A.'s title. B. died soon after this settlement, and his son C. came into possession of the property in 1829, and has, by building, greatly increased the value. Should C. be now evicted by the title paramount, what sum can he recover from A., the £1,200 penalty by the bond, or the actual amount of loss sustained, whether more or less than (£1,200) the sum secured by the bond.

No. 51. Is a condition of sale, stipulating that the conveyance shall be prepared by the vendors' solicitor, binding; and if not, why not?

No. 52. Are executors bound to plead the Statute of Limitations to a debt barred by lapse of time *at the death of the testator*?

No. 53. A. devises real estate charged with an annuity to his wife to B. in fee. A. dies, and his wife marries S., who purchases from B. the estate so devised to him. What becomes of the annuity, and has the annuitant (S.'s wife) any means of enforcing its payment during his life, and after his death supposing she survive him?

No. 55. An objection was made to the retention of A.'s name on the £10 householders' list of voters for the city of N. under the following circumstances:—A. is the owner of two outhouses having a yard *common to both*. In the yard there is a workshop distant from the house about five feet. The workshop locks up as a distinct building, but is connected with the house occupied by A. by a tiled covering extending from the workshop to the house, but not affixed to the house, but rests on the wall of the yard, and is perfectly open on the other side to the yard, so that A.'s tenant might walk under it if he thought proper without trespassing. The other conveniences in the yard, such as pump, &c., are used in common by A. and his tenants. The house occupied by A. without the shop would not constitute a sufficient qualification in point of value nor the *converse*, but taken together they would. Could the two buildings be joined to give the qualification, or was the objection a good one (*Dewhurst v. Fidden*, 7 M. and G. 182; *Powell v. Price*, 16 L. J. R. 139, C. P.; *Jolife v. Rice*, 25 L. J. R., C. P.)?

CHARLES R. GILMAN, Hon. Sec.

Norwich, 22nd December, 1853.

BIRMINGHAM LAW STUDENTS' SOCIETY, ESTABLISHED 1848.

PATRONS.

M. D. Hill, Esq., Q.C., Recorder of Birmingham.

John Balguy, Esq., Q.C., Commissioner of the Court of Bankruptcy.

E. R. Daniell, Esq., Q.C., Commissioner of the Court of Bankruptcy.

Leigh Trafford, Esq., Q.C., Judge of the County Court.

HONORARY MEMBERS.

R. E. Wilson, Esq., Barrister at Law, Registrar of the Court of Bankruptcy.

John Jeffreys, Esq., Barrister at Law.

George Chance, Esq., Barrister at Law.

Rupert Kettle, Esq., Barrister at Law.

William Wills, Esq., J.P.

And upwards of a hundred of the attorneys and solicitors of the town and neighbourhood.

At the sixth annual general meeting held on the 4th January instant, at the Philosophical Institution, Cannon-street,

Thomas Martineau, Esq. (Honorary Member) in the chair,

The Secretary having read the report, from which it appeared,

That the society at present consists of 111 honorary members (barristers, solicitors, and attorneys), and 31 ordinary members (articled clerks).

That the members had during the past year been engaged in the study of "Williams' Works on Real and Personal Property," and the current Examination questions, and in the discussion of moot points of a legal and jurisprudential character.

That the ordinary fortnightly meetings had been held without one omission, and that the average attendance of members had much increased.

That during the past year the society had established a system of correspondence with gentlemen residing at a distance, by which articled clerks who are out of the reach of similar societies are enabled to take part in the debates by sending their written opinions upon the various points discussed.

That many valuable additions had been made to the library, and that the secretary's accounts showed an increased balance in the society's favour, exclusive of a donation of £5 from Clement Ingleby, Esq. (honorary member).

It was moved by W. S. Allen, Esq. (honorary member), and seconded by Mr. C. E. Mathews, and resolved,

"That the report of the proceedings of the past year now presented by the committee be received and adopted."

Amongst other resolutions it was resolved, "That the best thanks of the society be presented to C. Ingleby, Esq., for his liberal donation."

The following officers were elected for the ensuing year:—

COMMITTEE.

M. A. Fitter, Esq., Honorary Member.

G. J. Johnson,

Francis Sanders,

S. Balden, jun.,

C. E. Mathews,

} Ordinary Members.

Secretary: Mr. G. J. Johnson, 64, Little Charles-street.

Corresponding Secretary: Mr. Fras. Sanders, 30, Waterloo-street.

Librarian: Mr. S. Balden, jun., Colmore-row.

NOTE.—With respect to that part of the above report which refers to the establishment of a system of correspondence with article clerks *not* resident in Birmingham, we may state for the benefit of our new subscribers, that we inserted in vol. 5, N.S. (p. 276) the resolutions of the Birmingham Law Students' Debating Society for the establishment of such a system, accompanied by a letter from the Corresponding Secretary, Mr. F. Sanders, and we refer such readers to the same. We understand that the plan has worked well since it has been in operation, and we would recommend such of our readers as may be disposed to avail themselves of the advantage (and such it really is) of being corresponding members of the above society to address themselves to Mr. Sanders, who will, we are sure, willingly give any further information that may be required in explanation of the plan. Our opinion of the utility of such a correspondence has been too frequently expressed to require reiteration here. Those of our subscribers who may be residing in small towns not able to support a debating society, will find the deficiency very nearly supplied by becoming corresponding members of the above society. We are certain that the practice of writing opinions on the various moot points discussed in the society must be of much service—both directly and indirectly. It is to be borne in mind that such written opinions are read at the meetings, and thus the solitary student in a distant town may have the satisfaction of knowing that what he has taken the trouble to write has not been altogether without result, for it is to be supposed that an opinion clearly the result of study would receive the attention which it deserved from the society.—Eds.

December 21, 1853.—Moot Point, No. 141.—Is a tenant for life or years liable at law for *permissive* waste? (Litt. s. 71; Saunders' Rep. 1, 323 b., n. 7; Herne v. Bembow, 4 Taunt. 764; Jones v. Hill, 7 Taunt. 392; Gibson v. Wells, 1 N. R. 290; Harnett v. Maitland, 16 M. and W.; L. J. 1847, Ex. 134; Chit. Gen. Prac., ed. 1833, vol. 1, pt. 1, 386, *et seq.*). Decided in the affirmative.

January 4, 1854.—Moot Point, No. 142. Can a servant, wrongfully discharged, wait until the end of his time of service, and then sue his master for the wages which would have become due during such term? (Gandell v. Pontigny, 1 Stark. 198; 4 Camp. 375; Collins v. Price, 5 Bing. 132; L. J. 1828, C. P. 241; Smith v. Hayward, 7 A. and E. 544; L. J. 1838, Q. B. 3; Fewings v. Tisdal, 1 Ex. 295; L. J. 1848, Ex. 18; Elderton v. Emmens, 6 C. B. 160; L. J. 1848, C. P. 307; Goodman v. Pocock, 15 Q. B. 576; L. J. 1850, Q. B. 411). Decided in the negative.

30, Waterloo-street.

FRANCIS SANDERS, Cor. Sec.

LONDON LAW STUDENTS' SOCIETY.

January 10, 1854.—Moot Point, No. 113. A tenant clandestinely removed his goods from the premises between sunset and midnight of a day on which rent became due. Can the landlord follow and distrain the goods? (*Biddle v. Bowater*, 21 Law Tim. Rep. 165; *Round v. Vaughan*, 1 Bing. N. C. 767). Affirmative, Mr. W. Mearls and Mr. Tyabjee. Negative, Mr. Rawlins and Mr. Smith.

January 17, 1854.—Moot Point, No. 114.—A., for valuable consideration, covenants to pay B., his mother, an annuity of £40 during her life, by equal half-yearly payments. By his will he directs his executors to pay all his just debts, and then to raise and pay an annuity of £40, by equal half-yearly payments to B. for life. Is B. entitled to both annuities? (*Wathen v. Smith*, 4 Madd. 324). Affirmative, Mr. Rhodes and Mr. Blagg. Negative, Mr. Cheate and Mr. Mossup.

January 24, 1854.—Moot Point, No. 71. Is an undue liberty of speech permitted to the public press of this country? Mr. Fowler opened the debate, and Messrs. Taylor, Hooper, and Stone spoke upon the question.

January 31, 1854.—Moot Point, No. 115. If a man sells and conveys an estate to which he has no title, and afterwards acquires the title, and dies without confirming the conveyance, the estate descending to his heir-at-law, will the heir be bound by his ancestor's contract? (*Nurse v. Faulkner*, 1 Anst. 11; *Bensley v. Bruden*, 2 Sim. and Stu. 619). Affirmative, Mr. Maude and Mr. Reade. Negative, Mr. Hanbury and Mr. Ellgood.

MOOT POINTS.

No. 15.—*Malicious Prosecution.*

Can an action for a malicious prosecution be maintained where the party charged has been illegally convicted by a magistrate who had no jurisdiction to entertain the charge (*Doewell v. Benningfield*, Car. and M. 9).

LECHLANAR.

No. 16.—*Lien—Innkeeper.*

Has an innkeeper a lien on a carriage brought to his hotel by a

guest, for the board and lodging of the guest? (*Turrell v. Crawley*, 18 L. J. Rep., N. S., C. P. 302).

LECHLANAR.

No. 17.—*Trustees—Devolution of Discretionary Power.*

Devise of certain real and personal property in 1843 to "A. and B., their executors and administrators, upon trust (*inter alia*) to raise the sum of £2,000, by sale, mortgage, or otherwise, at the discretion of the trustees," and to stand possessed of such sum, when raised, upon certain trusts thereby declared. A. died in 1845 and B. in 1851.

Can B.'s heir-at-law and executors together sell or mortgage the property for the purposes of the trust, and, if so, in which of them is the discretion as to raising the money by sale or mortgage, now vested?

LUCAS CORDES (Newport).

No. 18.—*Chancery Practice—Defendant in a Suit by Claim Absconding.*

In a suit commenced by claim, where the defendant has absconded after service of the claim, how must the plaintiff proceed to obtain judgment, there being no provisions in the Orders of the 22nd April, 1850, for taking a claim *pro confesso*, or entering an appearance for an absconding defendant, as in a suit commenced by bill?

LUCAS CORDES (Newport).

No. 19.—*Baron and Feme — Leaseholds — Rent reserved upon Underlease.*

J. S. being possessed of certain leaseholds, *jure marito*, underlet them to B. By the *reddendum* clause the rent was made payable to the lessor and his assigns during his life, and, after his decease, to his wife, her executors, administrators, and assigns. He survived his wife (who left a will by which she devised and bequeathed all her property, real and personal, to C., and appointed him her executor), and subsequently died himself, intestate.

Is the rent accrued since his decease payable to C., or to the husband's administrator? The mooter conceives that the latter is entitled to it.

LUCAS CORDES (Newport).

No. 20.—*Distress—Fraudulent Removal on Rent-day.*

In the case of *Dibble v. Bowater* (22 Law Journ. Q. B. 396) the question was whether, where rent was reserved quarterly, the 25th December being one of the quarterly days of payment, and the tenant on that day, and while the quarter's rent was unpaid, fraudulently removed his goods off the demised premises for the purpose of preventing a distress, the landlord was entitled, under the 11 Geo. 2,

cap. 29, s. 1, to follow and distrain the goods within thirty days after their removal. Held, *dissentiente* Crompton, J., that he was so entitled.

Was the opinion of Mr. Justice Crompton or that of the rest of the court correct? The mooter agrees with the opinion of the former.

LUCAS CORDES (Newport).

No. 21.—*Trover—Damages.*

Can the jury ever award nominal damages in trover, where the goods are not restored, but no substantial injury has been done to the plaintiff, as where he is merely a bailee of the goods converted? (*vide* Heald v. Carey, 11 C. B. 977; Mercer v. Jones, 3 Campb. 477; M'Leod v. M'Ghie, 2 Manning and Granger, 326; S. C. 2 Scott, N. R. 604; Finch v. Blount, 7 Carrington and Payne, 478).

LUCAS CORDES (Newport).

No. 22.—*Copyholds—Surrender by Joint Tenant to use of his Will.*

Did a surrender by one of two joint tenants to the use of his will prior to the 55 Geo. 3, c. 192, work a severance of the jointure? (*vide* Co. Litt. 59 b, and Edwards v. Champion, 3 De Gex, Macnaughten, and Gordon, 202).

LUCAS CORDES (Newport).

No. 23.—*Tenancy in Common, or Joint Tenancy.*

Conveyance by deed, operating at common law, to A. and B., *equally to be divided between them*. Do the grantees take as tenants in common, or as joint tenants? The mooter considers that they are joint tenants.

LUCAS CORDES (Newport).

No. 24.—*Gratuitous Bailment—Loss by Theft.*

In an action of detinue for certain articles of jewellery bailed to the defendant to be taken care of by him until the same should be re-demanded by the plaintiff, does a plea that defendant was to receive no hire or reward for taking care of the articles in question, and that they were feloniously stolen from defendant out of his dwelling-house, without defendant's knowledge or connivance by one J. S., who had surreptitiously concealed himself in defendant's dwelling-house, and who had at the same time stolen therefrom divers valuable articles, the property of the defendant, and had since been convicted of the said larceny, disclose a good defence to the action? The mooter apprehends that it does not.

LUCAS CORDES (Newport).

No. 25.—*Innkeeper—Horse Stolen—Calye's Case.*

It is said in Calye's case (8 Coke, 32, and 1 Smith's L. C., 1st

edit., 47, 48) "That if a man come to a common inn, and deliver his horse to the hostler, and require him to be put to pasture, which is done accordingly, and the horse is stolen, the innkeeper shall not answer for it, for the thing with which he shall be charged ought to be *infra hospitium*. But if the owner doth not require it, but the innholder of his own head puts his guest's horse to grass, he shall answer for him if he be stolen."

Is the former proposition correct? The mooter apprehends that it is not, but that the innkeeper, although he would not be liable in the former case *quod* innkeeper, would, nevertheless, be liable as bailee for hire, provided, of course, that he was to receive remuneration for the horse's keep.

LUCAS CORDES (Newport).

No. 26.—*Bequest subject to Conditions in Restraint of Marriage.*

Testator bequeaths £1,000 to his daughter M., payable on her attaining her age of twenty-one years, and also a further sum of £500 to be paid on her marriage, provided she should marry with her mother's consent. All the rest, residue, and remainder of his personal estate testator bequeathed to his wife.

By a codicil to his will testator bequeathed an annuity of £100 per annum to his said daughter for life, provided that in case she should marry without her mother's consent, the annuity should thereupon cease and determine. Soon after testator's decease, M., who had previously attained her majority, married without her mother's consent.

What do M. and her husband become entitled to under the above will upon their marriage? The mooter will contend that they are *not* entitled to the £500 legacy, but that the annuity continued in existence, and is still payable, notwithstanding the absence of the mother's consent to the marriage.

LUCAS CORDES (Newport).

No. 27.—*Next of Kin—Exclusion of Nephews and Nieces.*

Testator by his will directed that his personal estate should go between, to, and amongst *all and every the next of kin of himself and of his wife* in equal shares and proportions. Before testator's death some of his brothers died, leaving issue. Are these nephews and nieces of the testator entitled under the term "*next of kin*?"

The mooter's opinion is that they are not entitled.

JUNIUS (Huddersfield).

No. 28.—*Libel—Executors Suing.*

In the answers to the examination questions of last Michaelmas Term, by the editor of "*The Legulian*," he says, in answer to question 9, "*Common Law*," that the executors of A. could sue both on the bill of exchange and for the libel. The editor of the

LAW STUDENTS' MAGAZINE, in answer to the same question, contends that he could not sue for the libel. *Quære*, which is correct? This is a point of great practical importance. W. E. (Leeds).

ANSWERS TO MOOT POINTS.

No. 1.—*Diversion of Water—Injury* (antè, p. 55).

I take it to be quite clear that in this case the party injured has no remedy either at law or in equity. The railway company were under no obligation to continue to cause the water collected in the tunnel to flow through the drain they had themselves so recently constructed, though had W. L. enjoyed the use of the additional supply of water without interruption for twenty years, he would *then*, but not before, have acquired a right to its undisturbed enjoyment, under the second section of the Prescription Act.

LUCAS CORDES (Newport).

No. 2.—*Husband's Liabilities for Wife's Debts, dum sola* (antè, p. 56).

Although a husband upon his marriage becomes liable for all the debts incurred by his wife *dum sola*, yet this liability, "as it originated in the marriage, ceases with it; so that if the obligation be not enforced in the lifetime of the wife, the surviving husband cannot be charged either at law or in equity" (Macqueen upon Husband and Wife, p. 40 *in notis*). If, however, upon the wife's decease, any of her choses in action remain unreduced into possession, the husband can only avail himself of them by taking out administration to his wife, and, when he has done so, his wife's creditors can sue him in his administrative capacity, and obtain satisfaction of their demands to the extent of the property realised under the administration (Macqueen, 188, 189, and *Heard v. Stanford*, Ca. Temp. Talb. 173; 3 Peere Wms. 409).

LUCAS CORDES (Newport).

No. 9.—*Dower—No Deed of Uses of Fine* (antè, p. 57).

The effect of a fine, unaccompanied by a deed, to lead or declare its uses was that the subject-matter of the fine became vested in the cognizee, subject to a resulting trust in favour of the cognizor. The legal estate in the property was, therefore, outstanding at the death of the deceased cognizor, and, as he was married before the 3 & 4 Will 4, c. 105, his widow is not entitled to dower, because before that act dower was not claimable out of a trust estate.

LUCAS CORDES (Newport).

No. 160.—*Devise—Trust Property* (vol. v., p. 691).

No portion of the trust property passes under the will. C. D., not having appointed an executor to carry out the trust reposed in her by A. M., *administration de bonis non* must be taken out to the goods of A. M., not administered by C. D., when the administrator will be entitled to the furniture. If the confusion is such as to create a difficulty in separating the property, in other words, if there are no means of distinguishing C. D.'s property from that of A. M., the children of the latter will be entitled in preference to the former to that part of the property in dispute, which is so undistinguishable, as the law gives the whole without any reserve to the party whose rights are rendered uncertain without his own consent (Ward. v. Ayre, Cro. Jac. 366; 2. Bulst. 323; S.C. Poph. 38; 1 Hale P.C. 513; Colvill v. Reeves, 2. Camp. 576).

There is an exception where the goods are of a *uniform quality* and the *original quantities known*. "Quæstor" does not state the nature of all the property. As it was decided in the case of Colvill v. Reeves, cited *suprà*, that where the goods continue to be distinguishable, as in the case of furniture thrown together, there is no alteration in the property, if C. D. made an inventory of all the goods, as she was bound to do, I should imagine there would not be much difficulty in the matter.

LECHLANAR.

No. 165.—*Marriage of Devisee to Attesting Witness* (antè, p. 693).

I think this devise is good. The question is whether the devisee could take at the time of the execution of the will. If so, the act does not operate, as it appears to me only to apply to cases where a bequest is made to the wife or husband of an attesting witness, being actually married at the time of attestation. Here no wife or husband attests the will, but a single person who has no beneficial interest in the will at the time. The words of the act are, "that if any person shall attest the execution of any will to whom or to whose wife or husband, &c., such devise, &c. shall be utterly null and void." It is evident that the act talks of a husband or wife *quo tempore* the will was executed.

Here no devise is made to a husband or a wife, but simply to a bachelor or a spinster. They do not comprehend a contemplation of the mind or marriage *in futuro*. They do not say to whom or to whose contemplated wife or husband, or to whom or to whose wife or husband, or future wife or husband, but merely to whom or to whose wife or husband, then wife or husband. I will suppose A. and B. to be man and wife, and C. a testator. Now sec. 15 of the act says to A., "C. has got your wife's name down in his will for a thing or two, don't attest the will, or you won't get a sou;"; but, supposing A. and B. to be a single gent. and feme, sec. 15 does not say to A.,

"C. has left your sweetheart B. all his estate, you are a witness to the will, therefore you *must not marry*." Such a construction would be preposterous. It would have the effect of setting an Act of Parliament and principle of law at loggerheads, by indirectly operating in *restraint of marriage*.

LECHLANAR.

No. 166.—*Direction to Raise Money* (vol. v., p. 693).

I think the £1,000, having actually been taken out of the lands, it became personal property, having all the incidents of personality, and on C.'s death leaving no issue payable to testator's personal representative, in respect of which he had died intestate, and distributable under the statute.

LECHLANAR.

No. 169.—*Middlesex—Judgment not Registered* (ante, p. 693).

By 12 Edw. 1, c. 18; 29 Car. 2, c. 3, s. 10, judgments in the superior courts bind all lands, tenements, and hereditaments which defendant or any person in trust for him shall be seised or possessed at the time when the judgment is recorded, so as to take effect in priority to all subsequent incumbrances (2 Inst. 395; Litt. 265 b; Palmer v. Humphrey, Cro. Eliz. 584; Underhill v. Devereux, 2 Saund. by Wms. 68 f.) if duly registered in the Common Pleas (1 & 2 Vict. c. 110, ss. 13, 19; 2 & 3 Vict. c. 11; 3 & 4 Vic. c. 82). However, in order that such judgments should have effect in the county of Middlesex, they must also be entered in the proper office of that county (*vide* 5 Ann. c. 18; 6 Ann. c. 35; 7 Ann. c. 26; 8 Geo. 2, c. 6), which, I presume, are in no way repealed. As to the counties of Middlesex and York, registry of a judgment in the Court of Common Pleas *only* will not of itself amount to notice so as to affect property in those counties. If duly registered in the several courts, of course it would, it being the duty of a solicitor, where property changes owners, or is tendered in mortgage, to seek for any unsatisfied judgments there might exist at the time.

LECHLANAR.

No. 159.—*Prerogative, or Diocesan Administration* (vol. v., p. 691).

If a deceased at the time of his death leaves effects to such an amount as to be considered notable goods within some other diocese or peculiar than that in which he died, then the will must be proved before the metropolitan of the province by way of special prerogative (4 Inst. 335). However, this does not seem to be the answer to the drift of the question proposed by R. C., and I presume, although the fact is not stated, that the letters of administration granted to S. P. were taken out of the consistory courts of the Bishop of London, and therefore that the point at issue is simply "whether stock in the public funds are *bona notabilia* or not?" If

this is the question, my impression is that consols are *bona notabilia*, notwithstanding the *death* of the testator, and their being actually within the diocese of London (*Scarth v. Bishop of London*, 1 Hagg, 625), and it was decided in the case of *Rex v. Capper*, 5 Price, 262, that for the purposes of probate and administration stock in the public funds is supposed to lie within the archbishopric of Canterbury. Under this view of the case S. P. must take out prerogative administration to the whole effects, as the diocesan grant (there being *bona notabilia*) is absolutely void, and the property will be considered as wholly unadministered.

LECHLANAR.

No. 170.—*Devise of Trust Estates* (vol. v., p. 694).

A. B. appears to have died intestate as to trust estates, which, therefore, on his death devolved to his legal representative, subject, in contemplation of equity, to the original trust (1 Sand. Us. 227; *Gilb. Sugd.* 13, n. 5).

LECHLANAR.

No. 173.—*Copyhold Estates* (vol. v., p. 695).

B., previous to admittance, has only an equitable interest, and no estate whatever is vested in him as a copyhold tenant, therefore his surrender to a purchaser would be void (*Doe v. Tofield*, 11 East, 246).

LECHLANAR.

No. 171.—*Devise of Copyholds—Admission of Heir, &c.* (vol. v. p. 694).

I conceive that C. K. had a right to be admitted to the copyholds (in the absence of opposition by the trustees) as the heir at law of C. D. He could not be a trespasser, as the trustees were not admitted, but his estate would have been immediately defeated on the admittance of the trustees (1 Watk. Cop. 103, *et vide Doe v. Hall*, 16 East, 208) within the prescribed time. Previous to admittance they have no title to the manor of F. for the purposes of sale, having only an equitable interest therein, and any surrender by them in pursuance of the trusts of the will previous to admittance will be void, unconfirmable by matter *ex post facto*, as no subsequent admittance could make an act good which was void *ab initio* (*Doe v. Tofield*, 11 East, 246, 251). The question, therefore, resolves itself into this, "Can G. and Q. now be admitted to the manor of F., considering that C. K. has been in the undisturbed possession thereof for more than forty years?" I am strongly of opinion that they cannot, being barred by lapse of time from any remedy *at law*. If such is the case, of course there is a very material defect in the title. Whether the difficulty might be got over in a court of equity, and C. K. looked upon in the light of a trustee, and held accountable

for the intermediate rents and profits, is another question, which, if my views are correct, may be hereafter examined.

LECHLANAR.

No. 162.—*Accidental Injury, &c.* (vol. v., p. 692).

If the driver of the dog-cart was not guilty of any possible negligence, nor driving at a faster pace than was proper in going through the streets of a town where he could not but necessarily expect to meet with many people passing and re-passing, or if the mare was not of that spirited or vicious nature, unmanageable by the exercise of common skill, whereby he would not be justified in taking her to a public thoroughfare, I concur in the opinion of the mooter. Cases of this kind depend entirely on the accompanying circumstances, and I cannot find a case in point. It is a principle of law that if any accidental mischief happen to follow from the performance of any lawful act, *with due caution*, the party is excused from all guilt (1 East, P. C., c. 5, s. 36).

As driving a dog-cart through a town with due caution is a lawful act, this gentleman appears to be blameless (although if he had not run over the poor woman she would not have been hurt, nor would she have had to pay a doctor's bill for setting her right again. Queer, is it not?). I would also refer the mooter to the opinion, expressed by C. B. Pollock in delivering judgment in the case of *Greenland v. Chaplin*, where he doubted whether a man is responsible for all the possible consequences that may under any circumstances arise in respect of mischief which, by no possibility, could he have foreseen, and which no reasonable person, under any circumstances, could be called upon to have anticipated, and whether the rule of law be not this, that a man is expected to anticipate and guard against all reasonable consequences; but that he is not expected by the law of England to anticipate and guard against that which no reasonable man would expect would occur (19 L. J. Rep., N. S. Exch. p. 293).

LECHLANAR.

No. 158.—*Goods not of Quality Ordered, &c.* (vol. v., p. 690).

D. may please himself whether he fall in with the offer made to him by Snip or not; but I am very much inclined to think that he cannot bring an action against him for the sum paid for the coat. He should have kept or returned the whole suit. A contract was entered into for a *suit* of clothes, and not for a coat, waistcoat, or trousers separately. It is true an implied contract existed on the part of E. to execute his part in a workmanlike manner, but D. has no right now to dictate terms. The clothes not being of the quality contracted for, and ill made, he should have returned or tendered

the suit, when he could have recovered the money paid by an action in the superior courts.

LECHLANAR.

No. 175.—*Carriers—Passengers* (vol. v., p. 575).

It is true, as "W. R. W." says, that the only point in this case which raises any question is, that the handbills stated that the passengers would be landed for a few hours; but I dissent from the opinion that the original announcement was superseded. A contract, as defined by Stephen, is, "Where a promise is made on one side, and *assented* to on the other, or where two or more persons enter into an engagement with each other by a promise on *either side*. Here an express contract exists in which the terms of the agreement are publicly and openly avowed through the medium of handbills. The terms of this agreement are accepted, several parties availing themselves of the opportunity of a cheap trip to, and *a few hours' stay at, Weymouth*. A *few hours' stay* was a *leading* inducement. So far so good. There is on each side a *mutual* understanding on the subject.

Now it is clear law, that in the case of a parol contract reduced into writing, it is competent to the parties thereto at any time before the breach of it, by a new contract *not* in writing, either altogether to waive, dissolve, or alter the former agreement, or to qualify the terms of it, and thus to make a new contract. It is to be observed, that this can be done only *before the breach* of the original contract. If, therefore, the captain had given notice before the departure of the boat from S., the passengers might have been bound thereby upon direct or presumptive proof that such notice came to their knowledge in due time. But under the circumstances of this case, what alternative had the passengers between the choice of return in the boat or being left behind? An alternative which I contend the captain had no right whatever to put them to, when they could not *freely* exercise their right of assent or dissent. The notice being void *per se*, the passengers were not bound either to approve or disapprove of the same, and it follows that a new contract could not be implied where one party was not called upon to acquiesce, so that the *mutuality* necessary to its validity was wanting. On due consideration, I am therefore of opinion that A. and his party may recover.

LECHLANAR.

No. 14.—*Legacies—Deficiency of Undisposed-of Personality* (*antè*, p. 59).

I find it laid down in 2 Jarm. Wills, p. 601, that where lands devised are charged with debts, the assets will be marshalled in favour of pecuniary and specific legatees, lands so charged being applicable before pecuniary or specific legacies. Thus, in *Foster v. Cook*

(3 B. C.C. 347) where a testator had charged his real estate with his *debts*, and given legacies not so charged, the creditors having been paid out of the personal estate, which was not sufficient to pay both them and the legatees, the latter were allowed to come upon the real estate, so far as it had been applied in payment of debts. But I think the present question stronger than this, the property being personal, and not real, as in the above-mentioned case.

There is also the case of *Long v. Short* (1 P. Wms. 403), where one seised in fee of some lands, and possessed by lease for years of other lands, devised the fee to A. and the lease to B., and died indebted by bond. On a deficiency of assets, it was held that *both* the devisees should contribute to the payment of the bond.

As all property is now liable for the payment of debts, but personality primarily so, there can be no doubt that the leaseholds are liable, although specifically bequeathed. After the debts are satisfied, I think, from the cases before cited, that the pecuniary legatees are entitled to have their claims discharged from the same source, although they must contribute *pro rata* with the nephew and nieces, towards the payment of debts.

In case the proceeds arising from the sale of the furniture, &c. had realised more than was sufficient to pay the funeral expenses, they would then have gone into the fund for the payment of debts, and when all the debts were satisfied, the pecuniary legatees would then, but not before, have been entitled to have their claims discharged.

HENRY MURRAY (Oldham).

No. 2.—*Husband's Liabilities for Wife's Debts, dum sola*
(*antè*, p. 56).

I am of opinion that A. will not be liable; for though marriage subjects the husband, so long as the coverture lasts, to liability for all his wife's debts contracted prior to and owing at the time of the marriage, yet this liability (subject to a qualification in case proceedings had been taken not affecting the present question) ceases with the coverture, so far as regards the right of the creditor to make good his demand, either out of the husband's own proper funds, or out of the funds of the wife, which may have come to him *jure mariti*.

The law, having incapacitated the wife, during coverture, from doing any act, without the husband's consent, which could have the effect of charging either his own or the property which he holds in her right, except contracts for supplying herself with necessaries, the fact of the wife having paid something on account of the debts can, I think, have no effect in making the husband liable, for, being without his knowledge, they of course could not be with his consent. But even if, during her lifetime, she had had his authority to pay the debts

I think the question will still come under the rule of law before laid down, viz., that the liability will cease with the coverture.

HENRY MURRAY (Oldham).

No. 14.—*Legacies—Deficiency of Undisposed-of Personality* (anté, p. 59).

It is the duty of an executor to bury his testator in a manner suitable to his station in life, and the expenses of the funeral have a priority over all the debts or legacies of the testator (2 Williams on Executors and Administrators, 829). The executor, then, in this case, was justified in paying the funeral expenses out of the first moneys coming to his hands.

A bequest of leasehold property is a *specific legacy* (Williams, vol. ii. 1004); and a specific legacy does not abate with a general legacy when there is a deficiency of assets, for the fund out of which a general legatee is to be satisfied is the general personal estate, *after the specific legacy has been discharged* (Wms. 994—1174). F., S., and L. have no claim upon the leasehold property for payment of their legacies.

The general debts are by the testator charged upon the leasehold property, while the general legacies are payable out of the residuary personal estate. If then, out of the sale of the furniture, the executor had received a sufficient sum, afterpayment of the funeral expenses, to have enabled him to pay F., S., and L., and, instead of satisfying them, had discharged the general debts of the testator, I think the general legatees would have had a right to the payment of their legacies out of the leaseholds, or, in other words, to have the assets marshalled; for it is a general principle in equity, that where there are two funds, the one accessible to creditors only, the other to legatees and creditors, and the creditors obtain satisfaction of their debts out of the latter fund, the legatees shall stand in the place of the creditors with respect of the former fund (Williams, 1457). Although this rule is primarily applicable to the marshalling of realty and personalty as between creditors and legatees, yet a case such as the present seems to be within the principle (Williams, 1461).

W. Y. P.

No. 9.—*Dower—No Deed of Uses of Fine* (anté, p. 57).

For an answer to this question, I beg to refer the mooter to vol. v. of Cruise (title 36, cap. 10, sec. 19), where it is stated, that "If a wife joined with her husband in levying a fine of lands, whereof her husband was seised in fee simple, without any declaration of uses, the use resulted to the husband, and a new right of dower accrued to the wife. I can find no particular limitation as to the time after

the husband's death, within which dower must be claimed. But, by Stat. 3 & 4 Wm. 4, c. 27, s. 41, it is enacted that, after the 31st day of December, 1833, no arrears of dower can be recovered by action or suit for a longer period than six years next before the commencement of such action or suit. The widow's mode of recovering dower should, I think, be by filing a bill in equity.

W. R. W.

No. 4.—*Custody of Deeds* (vol. vi., p. 56).

I think that the eldest son is entitled to the custody of the deed inasmuch as the title to the copyhold property is not perfected by the deed, it requiring a subsequent surrender and admittance; but, granting them both to pass under the same deed, still I think the eldest son would be entitled to the custody of it on account of the superior quality of his estate.

J. F. C. (Walsall).

No. 2.—*Husband's Liabilities for Wife's Debts dum sola* (vol. vi., p. 56).

In Macqueer's "Husband and Wife," p. 193, I find the following:—"If the debts of the wife are not enforced during the coverture, the husband cannot be charged with them afterwards, either at law or in equity, her death furnishing an absolution or escape to him from all her obligations;" and in *Jordan v. Foley*, Sel. Ch. Ca. 19, I find that a husband who paid an interest on a bond (given by his wife *dum sola*) during his wife's life, was held discharged from liability to payment after her death, being only chargeable for what was sued for and recovered in her lifetime. *A fortiori* I think that a husband who has no knowledge whatever of his wife's debts during her lifetime, notwithstanding her part payment of those debts, is discharged by her death from any liability to the payment of the balance.

J. F. C. (Walsall).

No. 11.—*Tenancy—Taxes—Land-tax* (ante, p. 58).

In vol. ii. of Stephen's Commentaries (p. 545) I find the following:—"The tenant of the land is also by 38 Geo. 3, c. 5, s. 17, liable to a distress in event of this tax remaining in arrear; but is by the same act entitled to deduct the amount which he has paid for it out of the first sum that shall become due for rent, *unless he has agreed to pay all taxes*;" and in Digest of Law Journal Reports, 1845 to 1850, p. 375, there is as follows:—"The land-tax is a parliamentary tax, and within the meaning of an agreement to pay rent and all taxes parliamentary and parochial" (*Manning v. Lunn*, 2 Carr. and K. 13). Both these extracts prove the validity of an agreement to pay taxes.

JUNIUS (Huddersfield).

No. 2.—*Husband's Liabilities for Wife's Debts dum sola* (antè, p. 56).

I am of opinion that A. is not liable to pay the balance of the accounts contracted by his wife *dum sola*, although A. was jointly liable with her during the marriage, that is, during her life; yet upon her decease his personal liability, or in other words his responsibility, in the character of husband ceases. A. would only be liable in such case as administrator of his wife in the event of his administering to choses in action belonging to her, and not reduced into possession by her during the coverture.

T. M.

No. 2.—*Husband's Liabilities for Wife's Debts dum sola* (antè, p. 56).

I think A. is not liable after the death of his wife to pay the balance of accounts contracted by her *dum sola*. The case under consideration is not effected by the payments made on account by the wife during the marriage, nor would it be had the husband known of the debts at the time of the marriage, for then "he adopted her and her circumstances together." It has been decided that the husband cannot be sued alone for the debt of his wife contracted before marriage (*Mitchinson v. Hewson*, 7 T. R. 348). As, therefore, it is necessary in the recovery of such debts that husband and wife should be sued together, and this was not done in the lifetime of A.'s wife I think A. cannot now be compelled to pay them.

J. B. BETTS.

No. 123.—*Set-off* (vol. v. pp. 572, 641, 643, 699, and vol. 6, vi. 60).

I have hitherto abstained from taking any part in this discussion as mooter, in the hope that a unity of opinion in the answers of the correspondents would have been come to upon it, likewise to leave it fairly open for argument. Having given the opinions expressed my consideration, I cannot but fully agree with Mr. Owen and "T. G." in regard to A.'s non-liability to account to B. for the reasons stated founded upon the cases cited, and of which I had previously satisfied myself, as opposed to that of Mr. Cordes; yet the most important, and in truth, the *real* point, and which appears to have been but very cursorily noticed, as if it was a matter of no doubt, seems to me to be by far the most doubtful of the questions, namely, *as to right of A., as clerk, to retain the rent received by him, payable to his master as the agent of B., in the face of the well-known maxim in law that a set-off "must be mutual and due in the same right."* The rent received by A. was so received by him as the clerk of the attorney acting as the agent of B. The salary due to A. was due from his master personally, and it might appear that the amounts are unconnected and *not due in one and the same right*. The master, in his character of agent, really owed A. nothing; the wages, as above stated, were due for *general services* as a clerk, and

the tenant paid the rent to him knowing him as such; hence, I ask, can a clerk, having the possession of moneys, well knowing it not to belong to his master, retain it to liquidate any claim he may have for salary, &c. I am of opinion that he can retain and apply it as a set-off against salary due to him from his master, but I cannot find any case bearing directly upon the point; I shall, therefore, be pleased to find in the next number of the Magazine further opinions on this question, and to express my thanks to those gentlemen who have already undertaken the trouble of discussing this subject.

J. F. RICHARDS (Symond's Inn).

No. 1.—*Diversion of Water—Injury* (anté, p. 55).

If I rightly understand the mooter to say that the railway company left the ancient watercourse running along the gully as before, and merely diverted the additional supply of water from their tunnel, I am of opinion they were entitled to do so, for, in the absence of any stipulation, there must be twenty years' user of an artificial as well as a natural watercourse to give a right to have it run in its accustomed course (Selwyn's N.P. 1125; *Mayer v. Chadwick* (a very similar case), 11 Ad. and Ell. 571; 3 Per. and Dav. 367).

E. J. H.

No 2.—*Baron's Liability for Feme's Debts, dum sola* (anté, p. 56).

Debts contracted by the wife, *dum sola*, must be recovered against the husband and wife during the wife's lifetime, or they will not bind the husband surviving in his own right (F. N. B. 121 C. 1 Roll. Abr. 351 G., pl. 2). The point, therefore, in this case is, does the part payment by the wife, without the knowledge of her husband, prevent the operation of the general rule?

If the payment is to bind the husband at all it must be on the ground of its being made by his servant; but a servant has no authority to bind her master, without his express or implied consent, neither of which can be said to exist here (F. N. B. 120 G.; 1 Sidf. 127; *Etherington v. Parrott*, Lord Raymond, 1006).

The class of cases deciding that part payment or acknowledgment by one debtor binds the others are distinguishable from the present instance, because there the parties making the acknowledgment or payment were themselves separately liable.

For these reasons I submit the husband is not liable.

E. J. H.

No. 162.—*Accidental Injury—Woman run over by Dog-cart* (vol. v., p. 692).

I quite agree with the mooter of this point, where an accident happens entirely from a superior agency, and without default on the

part of the defendant, or blame imputable to him, an action for an injury resulting from such accident cannot be maintained (*Wakeman v. Robinson*, 1 Bing. 213, 215; *Hall v. Fearnley*, 3 Q. B. 919), the latter case being one quite in point.

No doubt it is a hardship upon the party injured to be without a remedy, but by that consideration courts of justice ought not to be influenced. "Hard cases," as observed by B. Rolfe in *Winterbottom v. Wright* (10 M. and W. 116), "are apt to introduce bad law."

S. ARBOUIN.

No. 163.—*Receipt Stamp—Condition of Sale—Neutralising Provisions of Act of Parliament* (vol. v., p. 692).

I differ with Mr. Cordes, and think the sheriff was right in his decision in this case. The act of Parliament, by enacting that a person receiving money shall always provide a stamped receipt at his own expense, merely settles a point of law which (in the absence of agreement) would be left open to custom and contract; but it does not go on to say that any agreement to the contrary notwithstanding shall be null and void, and, therefore, I am of opinion, only giving a just construction to the act, that it is neither evading the spirit or letter of the act in making it one of the conditions of sale that the purchaser shall pay for the stamps on the receipt for the purchase-money. He buys subject to the condition, and such condition, I am of opinion, is good.

S. ARBOUIN.

No. 2.—*Husband's Liability for Wife's Debts, dum sola* (ante, p. 56).

I think A. would not be liable to the debts of his deceased wife, contracted by her *dum sola*, for the principle of the merger of the wife in the husband, which gives him such important rights in her personal estate, rendering him liable for all the debts and liabilities of his wife contracted previously to her marriage, would not apply (2 Roper's Husband and Wife; *Palmer v. Wakefield*, 3 Beav. 227); and, if judgment for any debt be not recovered during the continuance of the marriage, the liability ceases, except to the extent of the assets to which the husband may be entitled as his wife's administrator (*Heard v. Stamford*, 3 P. Wms. 409); and it is stated in a note to p. 443 of Bl. Com. vol. i., that "though the husband has had a great fortune with his wife, if she dies before him, he is not liable to pay her debts contracted before marriage either in law or equity, unless there is some part of her personal property which he did not reduce into his possession before her death, which he must afterwards recover as her administrator, and to the extent of the value of that property he will be liable for his wife's debts *dum sola*, which remain undischarged during the coverture" (1 P. Wms. 468).

T. A. GLEED.

No. 4.—*Custody of Deeds* (ante, p. 56).

I am of opinion the eldest son would be entitled to the custody of the deed, as it would relate more to the freehold than the copyhold land, and in case of sale of the copyhold portion of the estate, that deed would not be required in order to make a good title, though I believe the eldest son would be obliged to produce it on the application and at the expense of the youngest son, on its being made apparent that its production was needful to the vindication of the title of the latter (*Fain v. Ayers*, 2 Sim. and Stu. 633). Such a necessity seems scarcely possible, as the rolls of the court are the evidences of title to copyhold property.

T. A. GLEED.

NOTICES OF NEW BOOKS.

- I. *Income-tax Tables, showing at Sight the Amount of Duty at 7℥, 6d., 5d. 3½d., 3d., 2½d., 2¼d., and 1½d. in the Pound, under the Statute 16 & 17 Vict. c. 34; Accompanied by a Variety of Statistical Information, extracted from Parliamentary Documents.* By CHARLES M. WILlich. 4th Edition. London: Longmans.
- II. *The New Succession and Legacy Duty Tables, under the authority of 16 & 17 Vict. c. 51.* By CHARLES M. WILlich. London: Longmans.

THE titles of the above works will sufficiently explain their objects, and suggest their utility to every practitioner, and we have only to say that the various "Tables" (which are accompanied with examples worked in the manner of the "Tutor's Assistant" and other works on arithmetic, the memory of which cannot quite have faded away from some of our readers), are framed in such a manner as to afford the required information at a glance.

The British Controversialist and Impartial Inquirer. Half-yearly Volume. July to December, 1853. London: Houlston and Stoneman.

THIS is a monthly publication which peculiarly concerns students, its object being to admit contributions by subscribers in the shape of discussions on important questions in Religion, Philosophy, History, Politics, and Social Economy, besides Questions and Answers on Subjects of importance to Students; Notices of New Books, articles on Rhetoric, and Instruction in Logic, Mathematics, Grammar, &c., by means of Classes. Altogether the publication is one deserving of support, as being calculated to effect what it aims at, and being conducted with much talent and spirit. It is, also, very cheap.

CORRESPONDENCE.

The Proposed Alterations in the Examination (ante, p. 51).

GENTLEMEN,—I am induced, from the importance of the subject, to offer a few remarks on the proposed extension of the examination of articled clerks to scientific and classical knowledge (vol. v., p. 685; *ante*, p. 51—55). There are many difficulties in the way of procuring a further test of this kind, arising partly from the disposition to favour many, who have, by industry and drudgery, acquired means and legal information sufficient to qualify themselves for the profession under the existing system. But, as many of this class have not received the advantage of superior education, and have creditably striven to raise their respective positions by undergoing severe struggles, it is urged that it would be unfair to impose an additional examination, which might have the effect of excluding many deserving and practical devotees of Themis, because they should not happen to be fortunately blessed with a knowledge of polite and general literature.

It is often asserted, too, that the more idle of the mere amateur law students would, from the mere accident of having in some way been obliged to collect some elementary knowledge, gain this unfair advantage, without regard to their own merits; and might, if the legal and general examinations were conducted by the same gentlemen, obtain some little favourable bias, after an unscathed transit through the latter, to compensate for a deficiency in the former ordeal.

These objections are not merely speculative; on the contrary, they receive countenance even from Mr. Gladstone's budget and theory, as by the first he evidently designed the admission of the class I have referred to; in the latter he alludes to it as comprising deserving persons, who ought to receive the benefit of a reduced scale, as well as the attorneys.

Then comes the answer to these objections. Were the question one merely affecting relative interests and situations of different classes of aspirants, there would be much force in these and similar observations; but the interests of the public require to be consulted in priority, and demand comprehensive knowledge, now that acquaintance with technical practice should be so much superseded by information on legal principles, and their application to the various transactions of the mercantile and scientific communities.

I cannot see the great advantage perceived by your last corre-

spendent (*anté*, p. 52) in the knowledge of French. It is a polite acquirement, certainly; but I think merely secondary to those branches of study which, in the ancient, historical, and poetical authors strengthen and refine, and in the pure and mixed sciences, expand the intellect. Then, as to the arrangements for the proposed change; I do not comprehend why the two examinations (legal and general) should not be conducted in separate divisions, the candidates taking either in succession, as in the University schools. If the same examiners were appointed for both divisions, care should be taken that both kinds of examination should be deemed independent and essential, and not comparative. And, although the examiners may have great trouble in reducing to a positive standard the respective merits of the candidates, yet, if the system is to be carried out at all, it should work well, and as there will be far greater incentives to emulation and energy in assigning a separate position to each individual according to his deserts, I incline to the view that, in each department, there should be a classification. I think the arrangement into classes, as suggested, almost as difficult in practice as a separate allocation, from the difficulty of fixing a relative standard; and the aspiration of the student should not be solely that he is ranked amongst the best of, but rather that he may distance all his competitors. In addition to this consideration, the duties of the examiners, who are not a fluctuating body, would become gradually easier from repeated judgment, as the experience of the University authorities would demonstrate.

I remain yours very truly,

SERVENS LEGEM.

MOOT POINTS.

No. 29.—*Partnership—Lunacy.*

In the year 1851 A. and B. entered into partnership, and the business has been carried on up to the present time by A., B. taking no active part therein. B. shortly afterwards becomes insane, and, in consequence of the disease appearing to be permanent, the friends of the lunatic are anxious to have a dissolution of the partnership. Does the fact of the lunacy dissolve such partnership?

"INQUIRENS."

No. 30.—*Absent Husband—Wife's Second Marriage—Liability of Clergymen.*

A., whose husband has been absent, and not heard of for upwards

of seven years, agrees to marry B.; A. and B. present themselves to the clergyman of the parish in which they reside, and request him to publish the banns, A. at the same time offering to make a statutory declaration before a proper authority that she has not heard of her husband during his absence. The clergyman refuses to comply with A. and B.'s request. Is the clergyman liable to any and what proceedings by reason of such refusal? And, assuming the clergyman to have acceded to A. and B.'s request, and married them, and the absent husband afterwards returns, is the clergyman in such a case liable to any and what proceedings, and if so at whose instance?

W. A. L.

No. 31.—*Legacies—Presumption of Satisfaction.*

Where legacies are charged upon real estate, and upwards of thirty years have elapsed since, and there is nothing (on the face of the abstract) on the sale of the estate to show that the legacies have been paid, what proof can the purchasers' solicitor insist upon as to the charges having been satisfied?

Supposing forty years to have elapsed, would the presumption be sufficient that the legacies had been satisfied? G. G. NORRIS.

No. 32.—*Power to Sell within Limited Time.*

A., by his will, dated in February, 1853, directed his executor to sell *within twelve calendar months after his decease*, all his (testator's) real estate in such manner as he (the executor) should think fit, and to convey and assure the same when sold, as in such cases usual. Should the sale take place within twelve months from the death of the testator, but the conveyance be not executed within that time, would the power be well exercised?

R. E.

No. 33.—*Power to Appoint—Mortgage, &c.*

A. being seised of freeholds in fee, married B. in 1829, and levied a fine, the uses whereof were declared by indenture to be to B. for life with power of appointment to A., and in default of appointment to her right heirs. A. and B., in exercise of her power, executed two mortgages for terms of years, and while they were existing B. again exercised the power of appointment by will in favour of A. *Quare*:—Was the power exceeded, and how often may a power be exercised?

R. E.

No. 34.—*Grant of Right of Way.*

A. puts up for sale by auction several plots of land in various lots; at the sale B. becomes the purchaser of several of the lots, and C. also buys several. A. reserves a right of way to some of B.'s land over part of the land purchased by C.; the following are the words

in B.'s conveyance, by which the right is granted to him by A.:—"And, particularly, a right of road or way *for all purposes and on all occasions*, over and along the lane or road, &c., for the said B., his heirs, appointees, and assigns."

In the conveyance to C. the right of way is reserved to B. in these words: "Subject, and reserving to the said B., his heirs and assigns, a right of way or road for all purposes and on all occasions *for the use and enjoyment of the said closes*, called, &c., *but for no other purpose*, over and along the lane called, &c."

One of B.'s closes adjoins the lane over which he has the right of way before mentioned, and of which C. has the fee. B. now claims the right to build upon his land close to the lane, and fronting it, and to have a right of way over the lane to the dwelling-house he may erect. When C. bought the land it was under the decided impression that B. had merely a right of way to the close *as such*, and had no right whatever to build in the way he now claims to do; and, as this lane is the road to dwelling-houses erected by C., the property of the latter would be seriously deteriorated in value, by the exercise of the right now claimed by B. The questions which these facts raise are: 1. Has B. the power under *his deed* to exercise the right he now claims? 2. If the rights of way had been reserved in B.'s deed in the same words as it is in C.'s (as I conceive it ought to have been), could B. build and use the way to such buildings as he now claims? 3. If the answer to the first question be in the affirmative, and the second in the negative, would C. have any cause of action against the vendor A. for compensation, by reason of A. granting the land to C. with a *limited* right of way to B., and having previously executed a deed granting to B. the right of way, *without any limitation whatever*?

Although B. and C. purchased their respective lots at the same sale, the conveyance to B. was executed a few days before that to C.

The case of *Allen v. Gomm* (11 Adol. and Ell. 759) is most in point of any I can find. See also *Akroyd v. Smith*, 19 Law Journal Rep. (C. P. 315). W. E. (Leeds).

NOTES OF RECENT LEADING CASES.

Dower—Gift of Personality to Widow—Election [*Parker v. Sowerby*, 17 Jur. 752].—The above case illustrates the rule that a person cannot be allowed to accept a benefit under a will and at the

same time reject another portion of it, and applies the same to the case of a widow to whom personal estate and an annuity are given by will and a devise is made of the real estate to trustees *with a power to lease* (the decision was on a case not within the 3 & 4 Will. 4, c. 105; see sect. 10). The widow was put to her election. V. C. Kindersley in his judgment said:—"In all cases in which the question has been discussed we find it laid down as a recognised principle, that in order to put the widow to her election, we must, from the terms of the will itself, collect an intention to dispose of the estate in a manner which would be wholly inconsistent with the allowance of the claim for dower, and that it is not enough merely to shew that there was no intention that the widow should enjoy both her dower and take the benefit conferred upon her by the will. As I previously observed, there have been decisions on that point, about the propriety of which there might be much argument. But however that may be, I feel myself bound by them. There is a series of cases which decide, that although a devise of all a testator's estates is no proof that the testator did not mean his wife to enjoy dower also, inasmuch as all his estates meant only what was his own to devise, yet a devise to trustees upon trust to manage a farm, or the giving a power to lease lands, has been considered indicative of an intention to deprive the widow of her rights, which, in the absence of such a power or trust, she would be entitled to claim. The cases on this subject are too numerous and uniform, and their authority is too high to allow me to hold at the present day that the principles to be deduced from them are not the established law. . . . The present case, then, comes within the authorities referred to; subject, however, to this observation, that the right to dower arose out of a particular freehold estate, while the benefit the widow received was derived out of the personal estate, and from an annuity charged on an estate different from that out of which the dower is claimed. Now, the rule is this—if a testator devises any portion of his real estate in such a manner that the claim of dower would defeat that intention, then the widow is put to her election, if there were any, even the slightest benefit—a gold watch, for instance—conferred upon her by the same instrument. For these reasons, I am of opinion that the widow in this case was put to her election."

WORKS FOR LAW STUDENTS.

We are happy to inform those of our subscribers who have expressed their anxiety about the appearance of the promised "*First Series*" of the "*LIBRARY*," that they need not be under any apprehension about it, for that the first work, viz., *LITTLETON'S TENURES*, will certainly make its appearance in the course of the present month of March. We cannot say the exact day, but so soon as it appears it shall be forwarded to those who have already, or may before then, send up orders for the same. We may as well mention, that we feel some little doubt about the orders received for the original (now the second) series prior to the announcement of the *First Series*, and since such announcement, without any specification of which series was intended. Are these orders to stand good for the "*First Series*" also? Will those gentlemen who have sent up orders, without specifying the *First Series*, be good enough to let us hear from them respecting this matter? We shall feel obliged if all orders hereafter sent will state that it is for the "*First Series*" (when so meant) in order that there may be no mistake.

Having made some progress with Littleton, we are able to state that there will be some interesting and novel points raised, besides those older ones relating to the descent of the share of a coparcener (which may now be considered as settled), and the right of dower and courtesy as affected by the Inheritance Act. We allude, in the first place, to the point whether a feoffment, without livery, will pass more than an estate at will, which, as most of our readers are aware, was the old doctrine; and as incidental thereto, whether, on a grant of lands without any express limitation of estate, a life estate will now pass, as formerly it did, on a feoffment with livery. As a feoffment always contains the word "grant," there can now be no reason, so far as we can see, why it should not operate as a grant if it cannot operate as a feoffment.

In the second place, we refer to a point respecting exchanges. An exchange was an exception from the rule that no freehold could, at the common law, pass without livery; but then, to compensate for this, it was requisite that the parties should each enter into the exchanged part before death; for if either party died before entry, his heir might have avoided the exchange (See Co. Litt. 50 b, 51 a; 2 Black Com. 323; 4 Jarman by Sweet, 2). Now this entry was evidently in lieu of the livery which otherwise would have been required; but as now lands, as regards the conveyance of the immediate freehold thereof, lie in grant as well as in livery (8 & 9 Vict. c. 106, s. 2). and as, on a grant, nothing is required for its perfection (not even attornment being required where the grant was of a

reversion, see *Doe v. Brown*, 17 Jur. 1161), and the estate is, therefore, in the grantee immediately (putting aside the question as to his assent or refusal, see Key, div. "Conveyancing," p. 113, 3rd edit.; Burt. Comp. pl. 212), and therefore his death cannot, it may be thought, now give the heir a right to re-enter into the lands given in exchange. And, perhaps, the provision in the 8 & 9 Vict. c. 106, s. 4, taking away the condition of re-entry on eviction, may have some effect in this case, though the real ground of the doctrine must first be ascertained to determine this.

The third point to which attention is directed is whether now, on a case having the word "grant" (or even without it, see Burt. Comp. pl. 43; Cowp. 600; 5 Term Rep. 129, 310, though it has been said that a demise is no grant), the lessee has not an estate without entry, and without reference to the Statute of Uses. In the case of a common law lease entry was always necessary; till then the lessee had but an *interesse termini*, as it was called (see Bac. Abr. tit. "Lease, &c.," M.) The freeholder alone was by the old law recognised, and possession and freehold were synonymous terms (Co. Litt. notes). The lease was looked at as a mere contract (Bac. Abr. *ut sup.*), and the word "grant" in it was considered only as a covenant (Mr. Butler's Note to Co. Litt. 384a, n. 1). But at this time the distinction was clear, as stated by Mr. Butler in the note just referred to, that a feoffment operated on the possession, *i.e.*, the freehold, whilst a grant did not so operate, but merely passed a right, or rather gave a right. It must be borne in mind that under the Statute of Uses no entry was requisite for the purpose of a release, though for the purpose of sustaining an action of trespass an actual entry or other similar possession must have been made or obtained (Com. Dig. tit. "Trespass," B, 3; Watk. Convey. by White, 36 note; Key, div. "Conveyancing," p. 47, 3d edit.). As now a grant gives, at least in the case of a freehold, an estate without any entry, it should seem that under a lease containing words of *immediate* grant the lessee would have an estate without entry. Some objection may probably be made to this by reason of the words of 8 and 9 Vict. c. 106, s. 4, which refer to "corporeal tenements and hereditaments," and the "conveyance of the immediate freehold thereof," and as a term for years does not amount to a freehold, it is left as it was before the act. This would be to put a very strict construction on the act, and to assert that a grant must necessarily be of a freehold interest, whereas it is well known that interests for a term of years were formerly created out of incorporeal things, or rather rights, by grants, and no one thought of denying that they were grants because the deeds purported to pass such limited interests.

We have thus hastily alluded to some points which have already occurred to us, and to which we have been obliged to refer rather

than discuss in "Littleton," as the limits, and, indeed, the object of the "First Series" would not admit of any lengthened statement. Our object *there* has been to direct the attention of the student to such matters as may supply him with food for further consideration, but in the subsequent works we shall be able to enter into more detail. We shall, therefore, be obliged if any of our readers will turn their attention to the topics above referred to, for we have not pretended to give our final opinion thereon, and though there will not be time before "Littleton" appears for us to enter into the subject, yet in these pages and possibly (in a summary manner) in Coke's "Comment," we may be able to do so. We should like to have a few well considered communications, as we feel certain that many of our readers are well capable of throwing light on the above points. The consideration of them must be beneficial to any one willing and able to undertake the necessary labour and research; and, indeed, we consider that the chief utility of such works as Littleton's, Coke's, and Shepherd's, consists in their recalling attention to the fundamental doctrines of the law, which have of late years been too much neglected.

QUESTIONS AND ANSWERS

ON THE

NEW EQUITY PRACTICE.

[Continued from p. 96.]

Appeals and Rehearings—Caveats—Inrolling Decrees—Abolition of Masters' Offices—Judges Sitting in Chambers—Drawing up Orders—Clerks to Judges—Adjourning Business—Summonses at Chambers—Appearance—Business before Chief Clerks—Accounts and Inquiries—Using Affidavits—Chief Clerks examining Witnesses—Entering orders at Chambers—Mode of taking Accounts at Chambers—Receivers—Advertisements in Chambers—Proceedings on Claims in Chambers.

APPEALS AND REHEARINGS—CAVEATS—INROLLING DECREES.

Within what time must an appeal from any decree, order, or dismissal, or any rehearing be had?

Within five years from the date of the decree, order, or dismissal (Decree Ord. of 7th Aug. 1852, pl. 1).

Within what time must a decree or order be enrolled?

Within six calendar months after the same is made ; but it may be done afterwards on special leave obtained (Decree Ord. of 7th Aug. 1852, pl. 2).

How is leave to enrol after the lapse of six months to be obtained ?

The party desiring the enrolment must obtain an order for the purpose, which order, unless made by consent of the adverse party, or on motion and notice to all the parties, must be a conditional order in the first instance, to become absolute without further order, unless cause is shown against it within twenty-eight days after service of the order (Dec. Ord. of 7th Aug. 1852, pl. 3).

Where a caveat against enrolment is entered, within what time must it be prosecuted ?

Within twenty-eight days after the docket of the decree or order is left to be signed with the proper officer by the party who entered the same (Dec. Ord. of 7th Aug. 1852, pl. 4).

What is the consequence of not duly prosecuting such caveat ?

The caveat will be of no force, and the docket of the decree or order may, immediately after the expiration of the twenty-eight days, be presented to be signed as if no such caveat had been entered (Dec. Ord. of 7th Aug. 1852, pl. 4).

What is the utmost time allowed for enrolling a decree or order ?

Five years from the date of such decree or order (Dec. Ord. of 7th Aug. 1852, pl. 5).

Can the times before mentioned for an appeal or rehearing, or for the enrolment of a decree or order be enlarged, and by whom ?

Yes, the Lord Chancellor, either sitting alone or with the Lords Justices, or either of them, may enlarge such times, where it shall, under the peculiar circumstances of the case, appear to be just and expedient so to do (Dec. Ord. of 7th Aug. 1852, pl. 6).

MASTERS—ABOLITION OF.

Have any and what provisions been made for abolishing the offices of masters in ordinary ?

By the 15 & 15 Vic. c. 80, the office of master in ordinary of the High Court of Chancery is abolished, but the present masters are, until discharged, to exercise their functions (ss. 1—6). Two of the masters were by the act released, and the others will be so as the business of their offices are disposed of.

Are any and what powers given to the masters to enable them to wind up proceedings before them ?

The masters may summon all or any of the parties to any cause, matter, or thing depending before or referred to them, or their solicitors, and proceed therewith, or give such directions and make such orders as may be necessary for the purpose of settling and winding up the same (c. 80, s. 7).

If the master cannot finally dispose of any matter before him, what may be done ?

He may dispose of any part of the business within his power, and report or certify to the court on the whole, and thereupon the court may make such order as it shall think proper (c. 80, s. 8).

Are fresh references made to the masters ?

No, except in cases in which from some previous reference made in the cause or matter, or in some other cause or matter connected therewith, the court may think it expedient to make such reference, and except in matters arising under the Joint Stock Companies' Winding-up Acts (c. 80, s. 10).

NOTE.—The courts do not even send references in pending suits to the masters, but they remit them to their chief clerks.

JUDGES SITTING IN CHAMBERS.

Are the judges required to sit in chambers ?

Yes ; the Master of the Rolls and the Vice-Chancellors are required to sit in chambers for the despatch of such part of the business of the court as can conveniently be heard in chambers (c. 80, s. 11).

What power have the judges at chambers ?

The same power and jurisdiction as if they were sitting in open court (c. 80, s. 13).

What matters are disposed of at chambers ?

The judges have directed that the following applications are to be made at chambers, viz :—1. As to the guardianship of infants (except the appointment of guardians *ad litem*). 2. For the appointment of special guardian to concur in a special case. 3. As to the maintenance or advancement of infants. 4. Under the Drainage Act. 5. For the administration of estates under the act of 15 & 16 Vict. c. 86). 6. Under the Legacy Duty Act for payment of money out of court. 7. For time to plead, answer, or demur. 8. For leave to amend bills or claims. 9. For enlarging publication, or the time for closing evidence. 10. For the production of documents. 11. Relating to the conduct of suits or matters. 12. As to matters connected with the management of property. 13. For payment into court of purchasers' moneys under sales by order of the court, and investing same. Some of the above applications are occasionally made to the court ; and, indeed, the judges have expressed themselves as unwilling to refuse an application merely because it should have been made in chambers. Besides which, very slight special matters will justify an application to the court.

DRAWING UP ORDERS.

By whom are the orders made at chambers to be drawn up ?

By the judges' clerks in ordinary cases ; but the judges may direct

any of them to be drawn up by a registrar in the same manner as orders made in open court are done (c. 80, s. 14).

Do orders drawn up at chambers require to be entered?

Yes, exactly in the same manner as orders made in court (Ord. of 16th Oct. 1852, pl. 28).

What force and effect have orders drawn up at chambers?

The same as orders of the court, and they may be signed and enrolled in like manner (c. 80, s. 15).

CLERKS TO JUDGES.

How many clerks has each judge?

Four; two chief clerks, and the others junior clerks (c. 80, ss. 16—22).

What are their duties?

To attend chambers, and perform such duties as the judge shall direct (c. 80, s. 23).

ADJOURNING BUSINESS.

Have the judges power to adjourn from open court to chambers, and, *vice versa*, the consideration of any matter?

Yes (c. 80, s. 27).

SUMMONSES AT CHAMBERS.

What is the mode of proceeding before judges at chambers?

By summons, and as near as may be according to the form adopted at the chambers of the judges at common law (c. 80, s. 28).

What is the form of the summons to attend the judge?

It requires the parties concerned to attend the judge at his chambers at an appointed time for the hearing of the application, the nature of which is concisely stated (Ord. of 16th Oct. 1852, Sched. A.)

Is any indorsement required to be made on the summons?

The name and address of the solicitor taking out the summons must be indorsed, and where the proceedings *originate* in chambers a notice is added that in case the party do not attend at the time and place mentioned an order will be made in his absence (Ord. of 16th Oct. 1852, Sched. A.)

How is the summons obtained?

The solicitor prepares the summons, which is sealed by the judge's clerk, with whom a copy is left (Ord. of 16th Oct. 1852, pl. 3).

What else is requisite in the case of an application originating in chambers?

A duplicate of the summons is also to be filed in the Record and Writ Office, and the copies for service must be stamped (Ord. of 16th Oct. 1852, pl. 4; c. 86, s. 46).

Within what time are summonses of a judge to be served?

Where the proceedings *originate* in chambers, the summons must be served seven clear days before the return thereof; but if not so served, a new day may, by stamped indorsement, be appointed. Other summonses are to be served two clear days before their return (Ord. of 16th Oct. 1852, pl. 5, 6).

Where, in proceedings *originating* at chambers, the summons has not been served seven days prior to the return thereof, what is to be done?

An endorsement should be made on the summons and upon a copy thereof stamped for service, appointing a new time for the parties not before served to attend the judge, which endorsement is to be sealed at the chambers. The service of the copy so endorsed and sealed has the same force and effect as the service of an original summons. Where any party has been served before such endorsement, the hearing thereof may, upon the return of the summons, be adjourned to the new time so appointed (Ord. of 16th Oct. 1852, pl. 6).

In what order are summonses heard?

A list of matters appointed for each day is affixed outside of the door of the judge's chambers, and subject to any special direction, such matters are heard in the order in which they appear in such list (Ord. of 16th Oct. 1852, pl. 22).

What provision is made for the adjournment of summonses?

Where the matters are not disposed of upon the return of the summonses, the parties must attend from time to time without further summons, at such time or times as may be appointed for the consideration or further consideration of the matters (Ord. of 16th Oct. 1852, pl. 16).

APPEARANCE TO SUMMONSES.

Where proceedings originate at chambers, what must the parties served with a summons do before being heard?

They must enter appearances in the Record and Writ Office, and give notice thereof (Ord. of 16th Oct. 1852, pl. 7).

BUSINESS BEFORE CHIEF CLERKS.

Have the judges power to direct what matters shall be heard before themselves, and what before their chief clerks?

Yes; and if the judge shall so direct, his chief clerks shall take accounts, and make such enquiries as were formerly prosecuted before the chief clerks of the masters; and the judge is to give his aid and directions in such accounts or inquiries as he may think proper, but subject nevertheless to the right of the suitor to bring any particular point before the judge himself (c. 80, s. 29).

What powers have the chief clerks of the judges in proceedings directed to be taken before them ?

The clerks have full power to issue advertisements, to summon parties and witnesses, to administer oaths, to take affidavits and acknowledgments (other than acknowledgments by married women), to receive affirmations, and, when so directed, to examine parties and witnesses, either upon interrogatories or *viva voce* as the judge shall direct (c. 80, s. 30).

If parties summoned by the chief clerks do not attend, what is the consequence ?

They are liable to process of contempt, in like manner as parties or witnesses are liable thereto in case of disobedience to any order of the court or of any writ of *subpoena* (c. 80, s. 31).

COPIES OF ORDER.

In cases of proceedings in chambers under any order, what should the solicitor do in the first instance ?

Leave a copy of such order at the judge's chambers, and certify the same to be a true copy of the order as passed and entered (Ord. of 16th Oct. 1852, pl. 17).

ACCOUNTS AND INQUIRIES AT CHAMBERS.

Where by an order accounts and inquiries are directed to be taken, what is to be done after a certified copy of the order has been left ?

A summons is to be issued to proceed with the accounts or inquiries directed, and upon the return of such summons, the judge is to be satisfied by proper evidence that all necessary parties have been served with notice of the order, and thereupon directions are to be given as to the manner in which each of the accounts and inquiries is to be prosecuted, the evidence to be adduced in support thereof, the parties who are to attend on the several accounts and inquiries, and the time within each proceeding is to be taken ; and a day or days may be appointed for the further attendance of the parties, and all such directions may afterwards be varied or added to as may be found necessary (Ord. of 16th Oct. 1852, pl. 18).

If upon the hearing of a summons to proceed it appears that the service of notice of the order directing accounts and inquiries cannot be made on any party, or ought to be dispensed with, what may be done ?

The judge may, if he think fit, wholly dispense with such service, or may, at his discretion, order any substituted service, or notice by advertisement or otherwise, in lieu of such service (Ord. of 16th Oct. 1852, pl. 19).

Where, on prosecuting the order directing accounts and inquiries,

it appears to be expedient to take further accounts or make further inquiries, what may be done ?

The judge may order the same to be taken or made accordingly, or if desired by any party, direct the same to be considered in open court (Ord. of 16th Oct. of 1852, pl. 20).

What is the course of practice at chambers generally, and also particularly as to copies of accounts, deeds, &c. ?

The course of proceeding in chambers is ordinarily to be the same as the course of proceeding in court upon motions. No states of facts, charges, or discharges, are to be brought in. But when directed; copies, abstracts, or extracts of or from accounts, deeds, or other documents, and pedigrees and concise statements, are to be supplied for the use of the judge and his chief clerk, and where so directed, copies are to handed over to the other parties. But no copies are to be made of deeds or documents where the originals can be brought in without special direction (Ord. of 16th October, 1852, pl. 23).

USING AFFIDAVITS.

Is any and what notice required to be given of the intention to use affidavits on proceedings in chambers ?

Yes; a party intending to use the affidavit must give notice thereof " to the other parties concerned " (Ord. of 16th Oct. 1852, pl. 24).

CHIEF CLERK EXAMINING WITNESSES.

Where a chief clerk is directed by the judge to examine any witness, what is the mode of proceeding ?

The same as in the case of the examination of witnesses before the examiner, subject, however, to any special directions which may be given in any particular case (Ord. of 16th Oct. 1852, pl. 26).

What is to be done with the original examinations and depositions of parties and witnesses taken by or before the chief clerk ?

They are, being first authenticated by a clerk's signature, to be transmitted by him to the Record and Writ Office, to be there filed, and any party to the suit or proceeding may have a copy thereof, or of any part or portion thereof, upon payment of the proper fee (Ord. of 16th Oct. 1852, pl. 27).

ENTERING ORDERS AT CHAMBERS.

Are orders made in chambers and drawn up by the chief clerk or registrar to be entered, and how ?

Yes; in the same manner, and in the same office, as orders made in open court are entered (Ord. of 16th Oct. 1842, pl. 28).

MODE OF TAKING ACCOUNTS AT CHAMBERS.

Where any account is directed to be taken, how is the party to do it?

The accounting party is, unless the judge shall otherwise direct, to make out his account and verify the same by affidavit. The items on each side of the account are to be numbered consecutively, and the account is to be referred to by the affidavit as an exhibit, and to be left in the judge's chambers (Order of 16th Oct. 1852, pl. 29).

What must be done by any party seeking to charge an accounting party beyond what he has by his account admitted to have received?

He must give notice of such his intention to the accounting party, stating, so far as he is able, the amount sought to be charged, and the particulars thereof, in a short and succinct manner (Ord. of 16th Oct. 1852, pl. 30).

RECEIVERS.

What proceedings are to be taken upon a receiver's account being left in the judge's chambers to be passed?

A summons to proceed thereon is to be taken out, and the account when passed is to be entered by the solicitor of the receiver in books, in the same manner as heretofore; but the affidavit verifying the account so passed, is to refer to it as an exhibit, and not to be annexed to it (Ord. of 16th Oct., 1852, pl. 31).

When a receivership has been completed, what should be done?

The books containing the accounts must be deposited in the Record and Writ Office (Ord. of 16th Oct. 1852, pl. 32).

ADVERTISEMENTS IN CHAMBERS.

How many advertisements are to be issued when they are required for any purpose in chambers?

A peremptory advertisement, and only one, is to be issued unless for any special reason it may be thought necessary to issue a second advertisement or further advertisements; and any advertisement may be repeated as many times and in such papers as may be directed (Ord. of 16th Oct. 1852, pl. 33).

How and by whom, are advertisements in chambers to be prepared and approved?

The advertisements are to be prepared by the solicitor, and submitted to the chief clerk for approval, and when approved are to be signed by him, and such signature is to be sufficient authority to the printer of the *Gazette* to insert the same (Ord. of 16th Oct. 1852, pl. 34).

What is to be stated in advertisements, and to be the form thereof, for creditors or other claimants?

Advertisements for creditors or other claimants are to fix a time for the creditors or claimants to come in and prove their claims, and to appoint a day for the hearing and adjudicating thereon, and may be in a form similar to the form set forth in Schedule (D) to these orders, with such variations as the circumstances of the case may require (Ord. of 16th Oct. 1852, pl. 35).

PROCEEDINGS ON CLAIMS IN CHAMBERS.

What are claimants coming in at chambers under an advertisement to do in the first instance?

Claimants coming in pursuant to advertisement are to enter their claims at the chambers of the judge in the "Summons and Appointment Book," for the day appointed for hearing by the advertisement, and to give notice thereof and of the affidavit filed, to the solicitors in the cause within the time specified in the advertisement for bringing in claims (Ord. of 16th Oct. 1852, pl. 36).

What parties are or not to take office copies of affidavits in chambers?

Claimants filing affidavits need not take office copies thereof; but the party prosecuting the cause or matter must take office copies, and produce the same at the hearing, unless otherwise ordered in chambers (Ord. of 16th Oct. 1852, pl. 37).

What is to be done if on the day appointed for hearing the claims they are not then disposed of?

In such case an adjournment day for hearing such claims is to be fixed; and where further evidence is to be adduced, a time may be named within which the evidence on both sides is to be closed, and directions may be given as to the mode in which such evidence is to be adduced (Ord. of 16th Oct. 1852, pl. 38).

Can new claimants be heard on the adjournment day?

Yes; provided he has entered his claim and filed his affidavit four clear days prior to such adjournment day, and no certificate of debts or claims has in the mean time been made (Ord. of 16th Oct. 1852, pl. 39).

What is provided as to creditors claiming debts not exceeding five pounds?

That they need not attend on the day of hearing, unless required to do so by notice from some party (Ord. of 16th Oct. 1852, pl. 40).

What is the further time for receiving claims, and can it be enlarged and how?

After the time fixed by the advertisement no claims are to be received, except as before provided in case of an adjournment, unless the judge at chambers shall think fit to give special leave, upon application made by summons, and then upon such terms and conditions as to costs and otherwise as the judge shall think fit (Ord. of 16th Oct. 1852, pl. 41).

What provision is made as to furnishing a list of proved claims?

A list of all claims allowed, shall, when required by a judge, be made out and left in the judge's chambers by a party prosecuting the order (Ord. of 16th Oct. 1825, pl. 42).

ON THE EXAMINATION OF ARTICLED CLERKS.

TESTIMONIAL TO MR. CORDES (vol. v., pp. 453, 534).

We have now to announce the presentation to Mr. Cordes of the testimonial referred to in vol. v., pp. 453—456, in doing which we are sorry to have to mention that Mr. Cordes was disabled, by ill health, from acknowledging the receipt of the works presented, which, as will be seen, was done by his brother on his behalf. It is to be hoped that Mr. Cordes will not be long before he finds his health fully restored. The following are the several communications which passed on the occasion:—

TO THE SUBSCRIBERS TO MR. CORDES' TESTIMONIAL.

GENTLEMEN,—We have at length the pleasure of laying before you the particulars of this matter, and only regret that delay has arisen; it must, however, be attributed to the indisposition of Mr. Cordes, who has been very unwell, and not to any tardiness on our part, who, immediately on closing the subscription list, addressed a letter to that gentleman. The amount subscribed to this testimonial was £4. 8s. 6d., and the following society and gentlemen gave subscriptions—viz., Birmingham Law Students' Society, Messrs. Beale, A. (Reading), Bravender, F. (Gloucester), Bridson, A. P. (Bolton), Broomhead, B. T. (Sheffield), Brown, W. P. (Gloucester), Brigg, J. (Norwich), Davison, T. J. R. (Yeovil), Dubois, F. (Derby), Druce, H. (Tembury), Edge, J. B. (Bolton), Ellis, C. (Ruthin), Evans, A. (Gloucester), Fairer, C. (Appleby), Gilman, C. R. (Norwich), Green, J. (Bradford), Gould, T. (Uttoxeter), Hall, J. (Bolton), Hinde, C. H. (Bolton), Hooper, T. J. (Upton-on-Severn), Hullett, J. (Coleford), Kilvert, J. M. (Ludlow), Massey, J. (Gloucester), Mourilyan, J. N., jun. (Sandwich), Ladd, W. (Norwich), Lomer, W. A. (Southampton), Lovegrove, H. T. (Gloucester), Miller, W. M. (Norwich), Norris, G. G. (Nottingham), Owen (Huddersfield), Powell, G. W. (Brecon), Feele, T. (Bradford), Pullam, A. (Taunton), Provis, T. J. (Oswestry), Pears, W. T. (Warrington), Randall, A. B. (Southampton), Richards, J. C. (Gloucester), Richardson, J. (Bolton), Roberts, T. V. (Oswestry),

Roe, J. S. (Southampton), Rogers, G. D. (Southampton), Ross, W. B. (Ipswich), Round, J. (London), Rowse, S. R. (Plymouth), Sharp, W. (Warrington), Summers, F. (Hull), Sampson (Hall), Slade, G. P. (Yeovil), Taynton, T. (Gloucester), Watkins, E. (Bolton), Whitcombe, G. (Gloucester), Witt, A. K. (Southampton). The sum was disposed of thus (agreeably to the wishes of Mr. Lucas Cordes):—

Campbell's Lives of the Lord Chancellors . .	£3	18	0
Wigram on the Interpretation of Wills . .	0	8	0
Carriage to Newport of the above works . .	0	2	6
	£4	8	6

—We remain, Gentlemen, your obedient servants,

HENRY DRUCE, } Treasurers and
WALTER M. MILLER, } Secretaries.

N.B.—The above list of donors we believe to be correct. Should any gentleman's name be omitted, or should he be desirous of having a copy list with amount of each donation, application may be made to Mr. H. Druce, 11. Gray's Inn-square, who will supply him with particulars.

Woodlands, 5th February, 1854.

DEAR SIR,—My brother regrets much that illness, which has confined him to bed for some time past, entirely prevents him from now addressing a few lines to you himself, but he desires through me to express to you and to those of his fellow students who have united in presenting him with the valuable set of books which he has received, his cordial thanks for the kind attention which they have thus shewn to him, and to assure them that he shall always regard the present as a pleasing testimony of their cheerful co-operation with him in an effort for their common benefit.—I am, dear sir, very faithfully yours,

THOMAS CORDES.

To Henry Druce and W. M. Miller, Esqrs., Secretaries, &c.

THE LAW STUDENTS' MUTUAL CORRESPONDING SOCIETY.

(To the Editors of the Law Students' Magazine.)

GENTLEMEN,—I have read with pleasure your remarks, in the last months' Magazine, on the above Society; and although I have the honour to be one of the great body of articulated clerks, I confess

I think there is some truth in your remark, that "nothing is to be done with articulated clerks without great exertion, and the exercise of much patience."

It does seem remarkable to me that the Society has not met with that encouragement it certainly deserves; and the only thing to which I can attribute it is the fact of its being but very slightly known amongst the articulated clerks in general that any such Society really exists. If it be that they are waiting to see how it works, and whether it be worthy of their attention, I for one have been a member sufficiently long to be fully sensible of, and to testify to them the great advantages which have and must necessarily arise from taking a part in its various discussions.

Although the Society may be said to be more adapted to the exigencies of those of my fellow-students who reside in towns destitute of anything in the shape of Debating Societies, yet I am one of those who think that more real learning may be gathered from *deliberately writing* an opinion on paper, than by engaging in a warm *vivâ voce* conflict. From these remarks, however, I would not have any one suppose that I disapprove of Debating Societies, but which, on the contrary, I would have every gentleman join when in town, even though it be for only a few months, which would, I think, be amply sufficient to *brace his nerves, and prepare him for the more exciting combat of reality which he hopes to encounter* when he emerges equipped in his coat of mail (*in the shape of a certificate*), to brave the warfare of a solicitor's life.

In conclusion, I would strenuously recommend such of my fellow-students who may not have already joined the Society to lose no time in forwarding their names to the secretary, feeling, as I confidently do, that the establishment of such a Society has conferred on the articulated clerk a great and lasting boon.—I am, Gentlemen, your obedient servant,

Chesterfield, Feb. 20, 1854.

A LAW STUDENT.

MUTUAL CORRESPONDENCE.

The following are the only additions to the list published, *antè*, pp. 15, 16, 75, viz.:—Mr. Henry Barker, at W. Barker's, Esq., Huddersfield; Mr. W. E. Barker, at W. Barker's Esq., Huddersfield; Mr. H. Reddish, at E. Reddish's, Esq., Stockport; Mr. A. Knowles, Yew Tree House, Brampton Moor, near Chesterfield.

HILARY TERM (1854) EXAMINATION QUESTIONS.

PRELIMINARY.

1. Where and with whom did you serve your clerkship? 2. State the particular branch or branches of the law to which you have principally applied yourself during your clerkship? 3. Mention some of the principal law books which you have read and studied? 4. Have you attended any and what law lectures?

COMMON LAW.

1. What is the form of the commencement of an action? 2. Supposing a defendant about to quit the country after a writ of summons issued against him, what steps must be taken to prevent his so doing? 3. What is meant by a concurrent writ, what is the object of it, and is there any limited time within which it must be issued? 4. If there be difficulty in finding a defendant to serve him with process, what step must be taken to enable the plaintiff to proceed? 5. Are all judgments by default final? 6. Is a writ of inquiry necessary now in all cases where the defendant has suffered judgment by default? 7. Is there any alteration lately in the process of ejectment, and if so, state it? What are the proceedings under the Common Law Procedure Act in lieu of judgment as in case of a nonsuit? 8. Can the defendant plead the bankruptcy of plaintiff as a bar to the action as a matter of course? 9. Upon service of a rule or order must the original be always shown? 10. If no steps have been taken in a cause for one year from the last proceeding, what is the course to be taken by the party wishing to proceed? 11. Must the successful party under an award wait until the time for setting aside the award has expired before he can tax his costs? 12. If a rule *nisi* be granted to set aside proceedings with costs, and is discharged, what is the result as to the costs? 13. Can an infant bring an action, and how? 14. In an action for seduction who must bring it, and in what form?

EQUITY.

1. In what cases will a court of equity decree a specific performance of a contract not reduced into writing? 2. Distinguish generally the class of cases in which bills in Chancery are expedient, in what cases claims are applicable, and when relief may be obtained by summons before a judge in chambers. 3. In what cases will a court of equity decree specific performance of a contract for sale of land not reduced into writing? 4. Will the court interfere to pro-

test the unauthorised use of trade marks, and in what cases? and what must the plaintiff prove in order to succeed? 5. What relief will the court give in the cases referred to in the last question? 6. What constitutes part performance of a verbal contract for purchase of freehold land sufficient to induce a court to decree specific performance? 7. State generally in what cases the Court of Chancery will interfere by way of injunction? 8. Can an executor by any and what means give priority to one creditor of his testator over others after a bill has been filed to administer the estate? 9. Within what time must a defendant make his defence to a bill or claim in equity? 10. State the different modes of defence he may adopt. 11. What is the difference between a plea and a demurrer? 12. An infant must sue by his next friend. Is any and what formality required in the appointment of next friend? 13. How do you enforce the appearance of a defendant to a bill or claim in Chancery? 14. How can you enforce an appearance by an infant or married woman? State generally the practice in presenting, serving, and bringing to a hearing a petition?

BANKRUPTCY.

1. Describe the principal object of the bankrupt law as existing in this country? 2. Enumerate the principal statutes which have been passed since 1820, with relation to the bankrupt law, and the most important changes made thereby. 3. Has the Court of Bankruptcy, as now established, *original* jurisdiction, or is its jurisdiction delegated by any other court or authority? Describe in what mode an adjudication in bankruptcy against a trader can be obtained by a creditor, and who is entitled to obtain it? 5. What is the evidence necessary to obtain an adjudication of bankruptcy on the application of a creditor? 6. In what cases, and by virtue of what statute can a trader obtain an adjudication of bankruptcy against himself, and what facts must be proved in order to obtain such adjudication? 7. What are the powers now in force for the collection of the bankrupt's estate, and by whom are they principally carried out? 8. Describe the penal branches of the bankrupt law, and the acts or omissions of the bankrupt which will subject him to the penalties? 9. By whom, and in what manner, and at what time is the official assignee appointed or chosen in each estate? 10. What are the benefits a bankrupt will derive from a strict compliance with the bankrupt law? 11. In what way, or by what instrument, is the judgment or opinion of the court of bankruptcy expressed as to the conduct of the bankrupt; and what is the nature and effect of such instrument? 12. What are the names or description of the principal officers of the Court of Bankruptcy, and what are the particular duties of each? 13. Is there any and what difference in the mode of proceeding to bankruptcy against a trader who is a member of

Parliament, from that of proceeding against any other trader?

14. What are the consequences of becoming bankrupt to a member of the House of Commons, and in what cases do those consequences attach? 15. By the commission of what acts does a trader disqualify himself from obtaining the benefit of the bankrupt law, and what are the consequences to him?

CONVEYANCING.

1. By what words may an estate tail special be aptly created? 2. What covenants, powers, and provisos are usually inserted in a mortgage in fee? 3. A., a tenant for life in possession, with remainder to B. in tail. Can B. by any and what means convert his estate tail into a fee simple? 4. Conveyance unto and to the use of A., B., and C., and their heirs. What estate do they respectively take, and how can they severally dispose thereof? 5. By bargain and sale enrolled, an estate is conveyed to B. and his heirs, to the use of C. and his heirs. What estates legal or equitable do B. and C. respectively take? 6. A. having power to appoint the fee, appoints to B. and his heirs, to the use of C. and his heirs, in trust for D. and his heirs. Which of these parties, B., C., or D., takes the legal, and which the beneficial estate? 7. Money in the funds and on mortgage is settled on A. for life, remainder to B., a *feme covert*, absolutely. Can B., with or without her husband, by any and what means pass her reversionary interest to a purchaser? 8. An advowson is mortgaged in fee, the incumbent dies. Who has the right to present to the living, the mortgagor or the mortgagee? Give the reason why the right to present is in the one or the other. 9. A. is possessed of a leasehold estate which he agrees to sell to B., without any special conditions as to title. What title has B. a right to require? 10. Is there any and what difference between dower and freebench? 11. A mortgagee in fee dies intestate; the mortgagor applies to redeem. What persons are necessary parties to the re-conveyance, and for what reason? 12. A. and B. exchange lands. B. is afterwards ousted from the land he received in exchange. Has he any and what remedy, and against whom? 13. An estate is settled to the use of A. for life, remainder to B. in tail, remainder to C. in fee. Who is entitled to the custody of the title deeds? 14. What is the rule in Shelly's case, and where is such rule to be found? 15. A. dies intestate, seised of estates in fee simple, leaving a grandson (issue of a deceased daughter), a great granddaughter (issue of a deceased son), and two daughters. Who will be entitled by descent to A.'s real estates?

CRIMINAL LAW.

1. Have all the superior courts concurrent jurisdiction in criminal

matters? 2. Name the supreme criminal court. 3. What is the exception to its jurisdiction? 4. Who is supreme coroner of the realm? 5. What is the mode of reviewing questions of law in criminal cases? 6. What is the jurisdiction of the Central Criminal Court? 7. Of what description are the commissions of the judges? 8. What offences are tried before quarter sessions? 9. What misdemeanours are excepted? 10. How are the criminal cases at quarter sessions reviewed? What is the course of proceeding in an appeal on a conviction? 12. Who appoints magistrates? 13. State the nature and form of a writ of *mandamus*? 14. What is the ordinary purpose of it, and how is its sufficiency to be supported or opposed? 15. What is the liability to costs of the party applying for, or resisting, the issuing of the writ?

HILARY TERM (1854) EXAMINATION ANSWERS.

COMMON LAW.

I. *Commencement of action*.—An action is commenced by suing out a writ of summons (15 & 16 Vict. c. 26, ss. 2—18; 5 Mag. N.S. 72).

II. *Leaving country*.—Where a defendant is about to quit the country after a writ of summons is issued against him, an order of a judge should be obtained for leave to issue a writ of *capias* for the defendant's arrest, or a warrant for that purpose may be obtained from a bankruptcy commissioner (1 & 2 Vict. c. 110; 14 & 15 Vict. c. 52; 4 Mag. N.S. 578).

III.—*Concurrent writ*.—A concurrent writ is one issued during the currency of a previous writ; its object is to enable the plaintiff to make efforts in different places at the same time to effect service; it must be issued within six months from the issuing of the original writ of summons (15 & 16 Vict. c. 26, s. 9; 5 Mag. N.S. 74).

IV. *Service of writ*.—If the defendant cannot be served personally with a copy of the writ of summons, the plaintiff should apply on affidavit to the court or a judge, showing that he has made exertions to serve the writ, and that the same has come to the defendant's knowledge, or that he wilfully evades service; on this an order may be made for the plaintiff to proceed as on a personal service (15 & 16 Vict. c. 26, s. 17; 5 Mag. N.S. 73).

V. *Judgments*.—All judgments by default are not final; those only are final in which the plaintiff seeks to recover a debt or liquidated demand in money (15 & 16 Vict. c. 26, s. 93; 5 Mag. N.S. 361).

VI. *Writ of inquiry*.—A writ of inquiry is not necessary in all cases in which a defendant has suffered judgment by default, not even where the judgment is interlocutory; for, where the damages are a matter of calculation, the court or judge may direct that the amount for which final judgment is to be signed may be ascertained by a master of the court (15 & 16 Vict. c. 26, s. 92; 5 Mag. N.S. 361).

VII. *Ejectment*.—An ejectment is now no longer commenced by the service of a declaration and notice, but by a writ directed to the persons in possession and to the persons entitled to defend the possession (15 & 16 Vict. c. 26, s. 168-219; 5 Mag. N.S. 501—514).

VIII. *Proceeding to trial*.—In order to force a plaintiff on to a trial, the defendant should give him a twenty days' notice to bring the issue on to be tried, when, if the plaintiff makes default in trying, the defendant may enter a suggestion thereof on the record, and sign judgment for his costs (15 & 16 Vict. c. 26, s. 101; 5 Mag. N.S. 363).

IX. *Bankruptcy, pleading*.—The bankruptcy of the plaintiff in an action which the assignees might have maintained for the benefit of the creditors, cannot be pleaded in bar to such action, unless the assignees decline to continue it and to give security for the costs, in default of which, however, the defendant may, within eight days after their refusal, plead the bankruptcy (15 & 16 Vict. c. 26, s. 142; 5 Mag. N.S. 444).

X. *Service of rule, &c.*—It is not necessary on serving a rule or order to show the original, unless sight of it is demanded, or the service be with a view to an attachment (rule of Hil. T. 1853, pl. 163).

XI. *No proceedings for a year*.—Where no steps are taken in a cause for a year, the party wishing to proceed must give a month's notice before taking any further proceedings (rule of Hil. T. 1853, pl. 176; 5 Mag. N.S. 667).

XII. *Award*.—*Taxing costs*.—A successful party under an award may proceed to tax his costs prior to the expiration of the time for setting aside the award (rule of Hil. T. 1853, pl. 170; 5 Mag. N.S. 66).

XIII. *Discharged rule—Costs*.—If a rule *nisi* to set aside proceedings for irregularity ask for costs and is discharged, and nothing is said as to the costs, the party making the application must pay the costs of the other side (rule of Hil. T. 1853, pl. 137; 5 Mag. N.S. 663).

XIV. *Infant*.—An infant may bring an action; the writ is sued out in his name just as in the case of an adult, but before declaring a next friend must be appointed, who is answerable for the costs,

and in fact conducts the suit for the infant (2 Mag. Supple. 115; Key div. "Common Law," pp. 83, 84, 3rd edit.)

XV.—Seduction.—An action for seduction cannot be maintained by the party seduced nor by her parents as such; it must be brought by her master or other employer, and her father may sue in the character of employer where the daughter was living at home and assisting in the household duties. The action is either in trespass or trespass on the case (Key, div. "Common Law," pp. 89, 91, 3rd edit.)

EQUITY.

I. Specific performance.—Specific performance of a contract not reduced into writing will be decreed where the defendant has by fraud prevented the contract being reduced into writing, or where there has been a part performance, or the defendant by his answer admits the contract and does not insist on the Statute of Frauds (5 Mag. N.S. p. 489—492).

II. Bills, claims, and summons.—Bills are required in all cases where claims and summonses are not required, except where an information is the proper proceeding. Claims are applicable to the ordinary cases of administration, foreclosure and redemption of mortgages, specific performance of agreements, partnership accounts compelling trustees to allow their names to be used by the *cestuis que trusts* in enforcing legal claims, and for the appointment of new trustees. Even in these cases bills may be, and very frequently are filed, though the court might in a very plain case disallow the additional costs (see 2 Mag. N.S. p. 150). The third way of commencing a suit in equity is by a summons, which, however, is limited to the single case of an administration, and in the case of *real estate* only where the will vests the whole of the real estates in trustees for sale with power to give receipts for the rents and produce (15 & 16 Vic. c. 86, ss. 45, 47, *antè*, p. 48).

III. Specific performance.—This question is a repetition of No. I.

IV. Trade marks.—A court of equity will interfere to prevent the unauthorised use of the trade marks of another who has been in the habit of using them on his goods, and which have become known to the public by those marks. The plaintiff must prove that the public may be misled by the defendant's marks to suppose they are buying goods made by the plaintiff. To entitle the plaintiff to protection there must be an intention on the part of the defendant to deceive the public. Indeed, where there is a strong resemblance in matter, colour, and arrangement of labels or covers on the goods of the defendant to those used by the plaintiff, a court of equity will presume that the same is not fortuitous, but that it is intentional with a view to mislead purchasers (*Edleston v. Veck*, 18 Jur. 7; *Rodgers v. Newill*, 17 Jur. 171; *Millington v. Fox*, 3 Myl. and Cr. 341).

V. *Trade marks*.—The relief which the courts give in the case of a wrongful user of another's trade mark is to enjoin the defendant from continuing to use such trade marks, and to make him account for any profits made through such wrongful user.

VI. *Part performance*.—To constitute part performance of a verbal contract for the purchase of freehold lands, so as to entitle a party to a decree for specific performance, it is essential that the acts alleged to constitute the part performance should clearly appear to have been done solely with a view to the agreement being performed (see further 5 Mag. N.S. pp. 490—492; Key, div. "Equity," p. 45, 3rd edit.; 3 Mag. N.S. p. 105—107).

VII. *Injunctions*.—Injunctions are granted for staying waste (see 3 Mag. N.S. p. 71), quieting possession, pirating copyright, using trade marks, publication of private letters, to stay proceedings at law, to prevent payment of money to a pretended executor, to restrain the carrying on of a trade contrary to a lawful covenant (3 Mag. N.S. p. 159, 160), the ploughing of particular lands, the continuance of a nuisance, the working of a colliery, or the navigation of a ship, &c. (see Woodd. Vin. Lect. 56; 3 Black. Com. 443; 2 Mag. N.S. Supp. p. 21).

VIII. *Executor giving priority*.—Even after a bill for administration is filed an executor may prefer a creditor who sues him at law and obtains a judgment by default. With respect to the general question, where there is a suit by a creditor against the executor for the recovery of his debt only, see Key, div. "Equity," p. 60, 3rd. edit.

IX. *Defence*.—To a bill the defendant has fourteen days after delivery of the interrogatories to make his defence by answer or plea; but, if he wishes to demur alone, he must do so within twelve days from appearance. In all these cases it is to be understood that the defendant may apply for further time (*ant*2, p. 17; 15 & 16 Vict. c. 86, s. 13; order of 7th Aug. 1852, pl. 19). With respect to a claim, the defendant must be prepared to show cause, on the expiration of fourteen days after service of the copy of the claim (*Ovd.* of 22nd April, 1850, pl. 11; 2 Mag. N.S. 147).

X. *Modes of defence*.—To a bill the defendant may either demur, plead, disclaim, or answer, though, indeed, in some cases the defendant may be compelled to answer, though he puts in a plea (4 Mag. N.S. pp. 325, 543; *Hunt v. Fenrice*, 18 Jur. 4). To a claim the only defence is by affidavits or the examination of witnesses under the late act; there is no formal pleading.

XI. *Plea and demurrer*.—A plea differs from a demurrer inasmuch as it sets up matter not apparent upon the bill as a bar to the suit, whereas a demurrer is had recourse to wherever any ground of

defence is apparent on the face of the bill (4 Mag. N.S. pp. 325, 543; Daniell's Pract. chaps. 13—16).

XII. *Next friend*.—The next friend to an infant must give his written consent to the use of his name, and the same must be filed with the bill or claim (15 & 16 Vict. c. 86, s. 11; 5 Mag. N.S. 679).

XIII. *Appearance*.—The appearance of the defendant to a claim is not requisite in order to enable the plaintiff to proceed (2 Mag. N.S. 147). In the case of a bill, the plaintiff may enter an appearance for the defendant, or may proceed to attach him (5 Mag. N.S. 682; Ord. of May, 1845, pl. 16, art. 3).

XIV. *Appearance of married women and infants*.—When a bill is filed against husband and wife, and the wife neglects to appear, the attachment is issued against her husband as a matter of course, he being at liberty to enter an appearance for his wife (see *Travers v. Bulkley*, 1 Ves. sen. 384). However, if the husband is out of the country, service may be effected upon the wife within the jurisdiction, and upon special application to the court on notice, an order may be obtained for an attachment to issue against her in default of appearance (see *Bushel v. Bushel*, 1 Sim. and Stu. 167; *Gee v. Cottle*, 3 Myl. and Cr. 180). With respect to *infants*, by the 32nd Order of May, 1845, art. 48, it is ordered that upon default by an infant defendant in not appearing to (or not answering) the bill, the court may, upon the application of the plaintiff, order that one of the solicitors of the court be assigned guardian of such infant defendant by whom he may appear to and answer (or may answer) the bill and defend the suit. The court must be satisfied that such defendant is an infant, and that the copy bill was duly served; and that a notice of such application was (after the expiration of the time for appearing to or answering the bill, and at least six clear days before the hearing of such application) served upon or left at the dwelling-house of the person with whom or under whose care such infant defendant was at the time of serving the copy bill, and was also served upon or left at the dwelling-house of the father or guardian (if any) of such infant where the person with whom or under whose care the infant was at the time of such service shall not be the father or guardian of the infant, unless the court at the time of hearing such application thinks fit to dispense with such last mentioned service (Pract. Equity, p. 128).

XV. *Petitions*.—A petition is presented by leaving it with the secretary of the judge to whom it is addressed, who thereupon appoints a day for hearing it; at the same time a fair copy of the petition on brief paper, briefways, should be left with the secretary for the use of the judge in court. As soon as the petition has been answered, a fair copy thereof on brief paper, with the judge's appointment for the hearing, must be served upon all parties in-

terested (see exp. Yates, 11 Jur. 33), at least two clear days before the hearing. Where the same solicitor acts on behalf of two parties in a cause, if he is served with one copy only of the petition, it should be stated for which client it is intended (12 Jur. 68). An affidavit of the service should be made and filed, and an office copy thereof obtained to be ready in court on the hearing. With respect to the hearing, a list of petitions is made out and set down for hearing, and upon the day appointed each petition is called on to be heard in its proper order. If no cause is shown against the petition the order will be granted according to the prayer thereof, upon production of the affidavit of service, and provided the case made out by the petitioner justifies such an order. If the petitioner neglects to appear on the petition being called on it will be dismissed with costs, upon production by the other party of an office copy of an affidavit of his having been served with the petition, and provided such party has an interest in the order to be made (*Dunbar v. Bolders*, 2 Madd. 581). If an order is granted it is drawn up, passed, and entered in the usual way. Before passing the order the original petition must be filed with the Clerk of the Reports (26th Order, 21st Dec. 1833).

BANKRUPTCY.

I. *Object of bankruptcy laws*.—The object of the bankruptcy laws as regards creditors is to ensure an equal distribution among them (except those having available security) of the bankrupt's asset; as respects the bankrupt himself, it is on his giving up all his estate, and showing his proper dealings as a trader, to discharge his person and future property from liability to his old debts (see Key, div. "Bankruptcy," p. 2, 2nd edit).

II. *Statutes*.—The principal statutes relating to the bankruptcy law since 1820 have been the following: the 6 Geo. 4, c. 16, to consolidate and amend the bankruptcy laws; the 1 & 2 Will. 4, c. 56, which established the Court of Bankruptcy in London, the Court of Review, substituted a fiat for a commission, and created official assignees; the 5 & 6 Vict. c. 122, which created the acts of bankruptcy on non-payment, &c., after demand and summons, gave the bankrupt five days to oppose adjudication before it was advertised; created country district courts of bankruptcy, and provided for the appointment of official assignees in the country. As to the 5 & 6 Vict. c. 116, the 7 & 8 Vict. c. 96, the 8 & 9 Vict. c. 127, relating chiefly to insolvent petitioners, and petitions for protection from arrest, the former of which parties are by the 10 & 11 Vict. c. 102, transferred to the Insolvent Court, to arrangements between debtors and creditors (see 2 Mag. O. S. 344; 5 *Id.* 139, 140; Key, div. "Bankruptcy," pp. 3—8). The present operative general statute is the

12 & 13 Vict. c. 106, commonly called the Bankruptcy Consolidation Act. The principal alterations and improvements made by the latter act are the creation of a primary jurisdiction in the commissioners; the taking away the necessity for the consent of creditors to a bankrupt's certificate; granting certificates of three different classes; making a bankrupt not liable on a promise to pay after certificate; making it necessary to file judge's orders; enabling the assignee or a creditor who has proved to proceed on permission like a judgment creditor (see further, Key, div. "Bankruptcy," pp. 10, 11, 2nd edit.).

III. *Jurisdiction*.—The Court of Bankruptcy has original jurisdiction, the jurisdiction not being now, as formerly, delegated by any other court or authority (12 & 13 Vict. c. 106, s. 12; Key, div. "Bankruptcy," p. 8—10).

IV. *Adjudication*.—In order to obtain an adjudication at the instance of a creditor, there must be proof of the debt of the petitioning creditor, or other creditor prosecuting the petition, of the trading, and of the act of bankruptcy. The petitioning creditor must personally attend to prove his debt, except on a certificate of ill health from his medical attendant, or where it is shown to be very expensive. The commissioner must examine into the nature and consideration of the debt, and before declaring the party a bankrupt, must cause to be entered on the proceedings a deposition of such petitioning creditor, stating the nature and amount of the debt due, and how, and for what consideration the same arose, together with the particular time or times the same became due. The trading and act of bankruptcy must be proved. Witnesses may be summoned to give evidence (12 & 13 Vict. c. 106, s. 100). After the proofs of the petitioning creditor's debt, and of the trading and act of bankruptcy by the party against whom the petition was filed, the commissioner may adjudge such person bankrupt, of which, however, he is to have notice before it is advertised (Mont. and Ayr. Pract. chap. 11; Eden's Bankr. Law, chap. 5; 12 & 13 Vict. c. 106, s. 101). The petitioning creditor is the proper person to obtain adjudication; but in case he delay to do so for three days without getting the time extended, any other creditor to the requisite amount may obtain an adjudication (Key, div. "Bankruptcy," p. 48, 2nd edit.; 12 & 13 Vict. c. 106, ss. 96, 101). The debtor may also obtain an adjudication against himself on his own petition (12 & 13 Vict. c. 106, ss. 70, 93; Key, div. "Bankruptcy," p. 44, 2nd edit.).

V. *Adjudication—Evidence*.—In order to obtain an adjudication on the application of a creditor, evidence must be given of a sufficient petitioning creditor's debt, of the trading, and of an act of bankruptcy (Key, div. "Bankruptcy," p. 47, 2nd edit.).

VI. *Trader making himself bankrupt.*—Formerly a trader might, by first filing a declaration of insolvency, sue out a fiat against himself, without reference to the amount of dividend likely to be payable. But by the 12 and 13 Vict. c. 106, s. 93, a trader petitioning for adjudication of bankruptcy against himself must, before adjudication, show that his available estate is sufficient to pay his creditors at least 5s. in the pound clear of all charges of prosecuting the bankruptcy. A declaration of insolvency must first have been filed under sect. 70, which directs that if any such trader shall file in the office of the Lord Chancellor's Secretary of Bankrupts a declaration in writing, in the form contained in schedule D to the act annexed, signed by such trader, and attested by an attorney or solicitor, that he is unable to meet his engagements, every such trader shall be deemed thereby to have committed an act of bankruptcy at the time of filing such declaration, provided a petition for adjudication of bankruptcy shall be filed by or against such trader within *two months* from the filing of such declaration. The petition must be in the form mentioned in schedule C to the act, stating the trader's residence during the previous six calendar months, the filing of a declaration of insolvency, and that the petitioner can make it appear to the satisfaction of the court that his available estate is sufficient to pay his creditors at least 5s. in the pound. The petition being signed by the trader, and attested by his solicitor, is filed with the registrar of the court.

VII. *Getting in estate.*—By the 12 & 13 Vict. c. 106, ss. 120—123, the court may summon before it any person known or suspected to have any estate of the bankrupt, or to be indebted to the bankrupt, and may require a full disclosure from such person; and in case such person sign an admission that he is indebted to the estate, the court may order him to pay the same. Besides this, the assignees may seize or recover by action or suit any property of the bankrupts, or sue the debtors to the estate. The leave of the court should be obtained (sect. 153; see Key, div. "Bankruptcy," pp. 62, 63, 2nd edlt.) A search warrant may issue to obtain possession of any goods supposed to belong to the bankrupt (sect. 106), and the court is empowered to order the transfer to the official assignee of any stock in any public company standing in the bankrupt's name, in his own right (sect. 128). The court may also order any banker or agent of the bankrupt to pay over all money in his hands (sect. 132). The assignees are the parties to carry out the above powers.

VIII. *Penalties.*—By sect. 251 of the Consolidation Act, if the bankrupt do not duly surrender himself after the adjudication, or if on his last examination the bankrupt fail to discover or deliver up such property as shall be in his possession (except the necessary wearing apparel of himself, his wife, and children), or if he conceal

any part of his property to the value of £10, or any writings relating thereto, with intent, &c., he is guilty of felony, and liable to transportation for not less than seven years, or imprisonment (with or without hard labour) for not more than seven years. By sect. 252, if any bankrupt shall, after an act of bankruptcy committed or in contemplation of bankruptcy, or with intent to defeat the object of the law relating to bankrupts, destroy, alter, mutilate, or falsify any of his books, papers, writings, or securities, or make or be privy to the making of any false or fraudulent entry in any book of account, or other document, with intent to defraud his creditors, every such bankrupt shall be deemed guilty of a misdemeanour, and on conviction be liable to imprisonment for any term not exceeding three years, with or without hard labour. By sect. 253, if any bankrupt shall, within three months next preceding the filing of the petition for adjudication, under the false colour and pretence of carrying on business and dealing in the ordinary course of trade, obtain on credit from any other person any goods or chattels, with intent to defraud the owner thereof, or if within such time, or with such intent, he knowingly remove, conceal, or dispose of any goods so obtained, every such bankrupt is guilty of a misdemeanour, and may be imprisoned for not more than two years, with or without hard labour (Key, div. "Bankruptcy," pp. 115—117).

IX. Official assignee.—Official assignees are permanent officers in bankruptcy, one of whom is in every bankruptcy attached to the estate. His appointment to the estate is made at the time of the adjudication by the commissioner (Key, div. "Bankruptcy," p. 57. 2nd edit.)

X. Benefits to bankrupt.—The benefits derivable by a bankrupt from a strict compliance with the bankrupt law are, besides his certificate, an allowance out of his estate for the support of himself and family, until he shall have passed his last examination (12 & 13 Vict. c. 106, ss. 194, 198).

XI. Certificate, classes of.—The opinion or judgment of the court as to the bankrupt's conduct is expressed by the certificate, which may be of the first, second, or third class, according to the propriety or impropriety of the bankrupt's conduct. The certificate frees him from arrest and future liability for debts provable under the bankruptcy (12 & 13 Vict. c. 106, ss. 198—200; Key, div. "Bankruptcy," pp. 119, 121, 2nd edit.)

XII. Officers in bankruptcy.—The principal officers of the Court of Bankruptcy are the registrars, the official assignees, the accountant, the master, and the messengers. The office of the Lord Chancellor's Secretary of Bankrupts was abolished by the 15 & 16 Vict. c. 77. The duties of the registrars consist in attending the commissioners during their sittings, and helping them to dispose of the

business; in many cases a registrar, in the case of absence or illness of the commissioner, may act for him, and he may be directed to take proof of debts and examine witnesses (1 & 2 Will. 4, c. 56, s. 9; 12 & 13 Vict. c. 106, ss. 27, 28; 15 Jurist, 617). As to the chief registrar, see 15 & 16 Vict. c. 77. The official assignees act with the creditors' assignees, and before the appointment of the latter the official assignee is the sole assignee, and afterwards he alone possesses and receives the personal estate and effects, and the rents and profits of the real estate, with the proceeds of all sales (8 Mag. N.S. 249; Key, div. "Bankruptcy," p. 57, 2nd edit.) The accountant superintends and controls the care and management of the funds belonging to bankrupts' estates, and of all funds belonging to the court (12 & 13 Vict. c. 106, ss. 31, 36). The master taxes the costs of proceedings in bankruptcy, takes affidavits, &c.

XIII. *Members of Parliament.*—Members of Parliament may be bankrupts, and the proceedings may be the same as against any other bankrupt, except that he cannot be imprisoned during the time of privilege, except in cases made a felony or misdemeanour by the bankrupt laws (12 & 13 Vict. c. 106, s. 66; 1 Atk. 197; Mont. and Ayr. Pract. 507). It is an act of bankruptcy in a member of Parliament, being a trader, if, on being served with a summons in an action for the recovery of a debt (verified by affidavit duly filed) of such amount as shall be sufficient to support a petition for adjudication, he do not, within one calendar month, pay, secure, or compound for such debt, or enter into a bond with two sureties for payment of the debt and costs (if recovered), and within one month after service of the summons enter an appearance (see 6 Law Stud. Mag. 249). This act of bankruptcy is contained in sect. 77 of the Consolidation Act.

XIV. *Members of Parliament.*—The consequences to a member of Parliament from his being found bankrupt are, that he is incapable of sitting or voting for twelve months, unless the petition for adjudication be within that time superseded or the debts paid in full; if this be not done after twelve months, the commissioners are to certify to the Speaker, whereon the seat is vacated and a new writ is to issue (52 Geo. 3, c. 144, s. 1 and 2; 2 Steph. Com. 340, 2nd edit.; Mont. and Ayr. Bank. Pr. 116, 716, 2nd edit.) During the time of his privilege he is not liable to be arrested or imprisoned, except in cases made felony or misdemeanour. This is by sect. 66 of the Consolidation Act, which enacts that if any trader, subject to the bankrupt laws, having privilege of Parliament, shall commit any act of bankruptcy, he may be dealt with under that act in like manner as any other trader; but he is not to be subject to be arrested or imprisoned during the time of such privilege, except in

cases made felonies or misdemeanours by that act. This liability to arrest in cases of misdemeanours is new: the 6 Geo. 4, c. 16 (now repealed), only subjected a member of Parliament trader to imprisonment in cases of felonies.

XV.—*Certificate—Refusal of.*—The benefits referred to in this question are those which would arise from a grant of a certificate; as to which we may observe, that a certificate, though granted, will be void if any of the matters stated in sect. 201 of the Consolidation Act have occurred, that is, if the bankrupt has lost by gaming in one day £20, or within a year of his bankruptcy £200, or £200 by stock-jobbing; or after an act of bankruptcy has concealed or destroyed his books, &c., or made fraudulent entries therein, or has concealed part of his property, or permitted a fictitious debt to be proved (see 3 Law Stud. Mag. N.S. pp. 140, 141). And further, if a certificate has, from a want of knowledge of any of these circumstances, been allowed, it will, on proof of any of them, be wholly void (Key, div. "Bankruptcy," pp. 126, 127, 2nd edit.).

CONVEYANCING.

I. *Tail special.*—An estate tail special in a deed may be created by a limitation to a man and the heirs of the body of him and of a certain woman, or *vice versa*; the point which distinguishes this estate from general tail is that *both* the parents from whom the issue is to be derived are marked out. They need not, however, both take an estate (Litt. ss. 16, 26).

II. *Mortgage.*—In the case of a mortgage in fee, the usual covenants, powers, and provisos are as follow:—Covenants by the mortgagor to pay the principal sum and interest, to keep the buildings in repair and insured, to pay all taxes, &c., and the usual absolute covenants for title, powers for mortgagor to lease under proper restrictions, and for mortgagee to sell on default in paying principal or interest, provisos for redemption on payment and for reconveyance, and also for possession by the mortgagor until default in payment.

III. *Barring entail.*—The estates of A. and B. are to be supposed to have been created by the same settlement, and therefore, as A. would be the protector thereof, B. cannot without his consent convert his estate tail into an absolute fee simple, except, indeed, it be supposed that he has the immediate remainder or reversion in fee, when, even without A.'s consent, B. could create an estate in fee, which, however, in this as in the former case, would be in remainder, because expectant on A.'s life estate (3 & 4 Will. 4, c. 74, ss. 15, 34; Key, div. "Conveyancing," pp. 34—39, 3rd edit.).

IV. *Joint tenancy.*—On a conveyance unto and to the use of A., B., and C., and their heirs, they take a legal fee in joint

tenancy (see 2 Mag. O.S. 40, as to the expression, "to and to the use of;" Key, div. "Conveyancing," p. 63, 3rd edit.) They may severally dispose of their estates by grant.

V. *Bargain and sale to use*.—The legal estate is vested in B. and his heirs, and C. and his heirs have but an equitable interest. This depends on the nature of a bargain and sale, and on the construction put on the Statute of Uses. The bargain and sale is adapted to the case where a person, seised of land in possession, vested remainder, or reversion, proposes to convey it to some other person. In its terms it consists in a bargain and sale by the alienor to the intended alienee for money. By the effect of this contract the alienor becomes seised to the use of the alienee in fee or other estate limited. Then the Statute of Uses (27 Hen. 8. c. 10) operates to execute the use; that is, it instantaneously transmutes the equitable interest of the alienee into a legal estate of the same nature, and makes him tenant of the land accordingly, instead of the alienor, whose estate is at the same moment annihilated. It might be supposed, that where the alienee was to stand seised to the use of another, the statute would also execute this use, by transferring the possession to the person to whose use he stood seised; but it was determined, soon after the passing of the act, that a use limited by the conveyances could not be executed by the statute. As, by the effect of the bargain and sale the alienee has but a use, which use is executed by the statute, it follows, that any further use, limited by the conveyance, will not be executed, but will remain a mere equitable interest (1 Hayes' Convey. 37, 53, 74, 5th edit.; 2 Black. Com. 333, *et seq.*; Watk. Princ. Convey. Introd. 11, 12, 2nd edit.; Co. Litt. 271, b. note; Shepp. Touchst. 225; Bacon's Abr. tit. "Uses," H. 1; Com. Dig. tit. "Bargain and Sale" (B. 3), and "Uses" (C.); 1 Prest. Abat. 307; 1 Steph. Com. 333, 341, 494, 1st ed.; Noy's Maxims, 309, note by Bythewood). The maxim that there can be no use upon a use proceeded upon the principle that, after the limitation of one, another must be considered as repugnant, and therefore void. Yet the doctrine, however firmly settled, is, upon the whole, not satisfactory; for it was clearly intended in the case put in the question that C. should have the beneficial interest, and the instant the first use was executed in B., he might, without impropriety, have been considered as seised to the use of C., which second use the statute might as well have been permitted to execute as it did the first (Bacon on Uses, 134, by Rowe; Watk. Princ. Convey. Introd. p. 11; 2 Black. Com. 338).

VI. *Appointment to uses*.—Powers do not operate as a conveyance of the possession of the estate, but like the bargain and sale spoken of in the preceding answer, as the limitation of a use. Hence the appointment by A. to B. and his heirs to the use of C. and his heirs

in trust for D. and his heirs, gives the legal estate to B., who holds the same in trust, not for C. (who takes nothing), but for D. and his heirs (see Key, div. "Conveyancing," p. 130, 3rd edit; Co. Litt. 271 b., n. 1, s. 3 (4); Noy's Max. Bythew. 307).

VII. *Wife's reversionary interests*.—Neither the money in the funds nor that on mortgage (unless, indeed, the equity of redemption were foreclosed) can be effectually disposed of to a purchaser (Key, div. "Conveyancing," pp. 95—97; Purdew v. Jackson, 1 Russ. 1; Elwyn v. Williams, 7 Jur. 337; see 4 Mag. N.S. 39—41, 200—203, 393, 660; Hobby v. Allen has been doubted).

VIII. *Advowson—Mortgage*.—The mortgagor is entitled to present, inasmuch as the courts do not recognise an advowson as a matter by which a profit can be made, or, as it is sometimes put, that equity considers the mortgagor as the real owner (Key, div. "Conveyancing," p. 79; Coote's Mortg. pp. 33, 202, 3rd edit.)

IX. *Leasehold—Sale—Title*.—B. can require not only the leasehold title but also the freehold one (see Key, div. "Conveyancing," p. 157, 3rd edit.; 3 Mag. N.S. 103, 105; 6 Id. O.S. 299).

X. *Dower and freebench*.—The essential difference between dower and freebench is that the former (prior to the Dower Act) was had out of all the lands of inheritance of which the husband was at any time during the coverture seised, whilst the latter was only to be had of such lands as the husband died seised of. Again, the former was always a third, the latter a moiety, or even the whole, according to the custom (Litt. sect. 37). The dower is not forfeitable by re-marriage, the freebench is in some instances by the custom (Key, div. "Conveyancing," p. 99, 3rd edit.; 2 Black. Com. 129, 133, 138).

XI. *Mortgage—Re-conveyance*.—The mortgage, whilst redeemable, is *personal* assets in equity; therefore, where a mortgagee in fee dies, his heir or devisee will be a *trustee for the executor*. Thus the personal representative really becomes entitled to the land mortgaged, as well as to the money. However, in order to get the legal estate out of the heir or devisee of the mortgagee, it will be necessary that such heir or devisee should join the executors of the mortgagee in executing a re-conveyance of the mortgaged estate, or that proceedings should be taken under the Trustee Act, 1850.

XII. *Exchange*.—On an exchange since the 8 & 9 Vict. c. 106, s. 3, the party ousted has no other remedy than on the covenants for title (Key, div. "Conveyancing," p. 114, 3rd edit.; 4 Jarm. Convey. 5).

XIII. *Title deeds*.—As between A., B., and C., A. is entitled, in respect of his life estate, to the custody of the title deeds, though the remainder-men may, under certain circumstances, have the deeds brought into a court of equity (6 Mag. O.S. 86, 87; Princ. Equity, 180, 181). In fact, it may be broadly laid down that the right to the

estate confers a right to the possession of the title deeds, and a tenant for life is within this rule (*Smith v. Chichester*, 2 Drury and Warren, 320). We suppose the examiners meant the question to refer to the right of the *cestuis que trust, inter se*; if, as between re-lessee to user and *cestuis que trust*, see Co. Litt. 6 a. n. (4); Hay. Convey. 481, 4 edit.; Noy's Max. 89, n. (a.); 5 Jurist, 1058; *Reece v. Trye*, 1 De Gex and Smales, 273).

XIV. *Shelley's case*.—The rule in *Shelley's case* may be concisely stated to be, that wherever an estate of freehold is given, and by the same conveyance or will an ulterior estate (whether immediately following the first or subject to other intervening remainders) is limited to the heirs of the same person, such ulterior estate vests in that person himself in the same manner as if it had been expressly given to him and his heirs. In such a case the word "heirs" is a word not of purchase but of limitation, *i.e.*, of description of estate (*Fearne's Conting. Rem.* 28; 1 Steph. Com. 407, 2nd edit.; *Burton's Comp.* pl. 339; Key, div. "Conveyancing," pp. 26, 27, 3rd edit).

XV. *Descent*.—The great granddaughter will be entitled by descent to, A.'s real estates, the rule being that the male issue and their descendants shall be admitted before the female (2 Black Com. 212, 213; Key, div. "Conveyancing," p. 74, 3rd edit).

CRIMINAL LAW.

I. *Courts*.—The only one of the superior courts at Westminster having jurisdiction in criminal matters is the Court of Queen's Bench (4 Black. Com. 265; Key div. "Criminal Law," p. 2, 2nd edit.; 6 Mag. O. S. 365, 366).

II. *Supreme court*.—The supreme court of criminal jurisdiction is in reality the House of Lords, but the examiners conceive it to be the Court of Queen's Bench (6 Mag. O. S. 365, 366; Key, div. "Criminal Law," p. 2, 2nd edit). The real distinction is, that so far as *original* jurisdiction is concerned, the Court of Queen's Bench is said to have a supreme jurisdiction, but even the correctness of this may be doubted (see next answer), whilst the House of Lords is in reality the supreme criminal court, in respect of its *appellate* jurisdiction.

III. *Exception to jurisdiction*.—The exception to the jurisdiction of the Queen's Bench refers to the person and to the crime; for a peer cannot be tried in the Queen's Bench for treason or felony, or misprision of treason (6 Mag. 366; Com. Dig. tit. "Dignity," F. 1, 2). It is said that when a statute creates a new offence as well as a new jurisdiction for the punishment of it, it is questionable whether the Court of Queen's Bench has any implied jurisdiction over the offence (2 Deacon's Crim. Law, 729).

IV. *Coroner*.—The supreme coroner of England is the chief justice of the Queen's Bench; *quære* as to the correctness of the expression "realm" (Key, *div. "Criminal Law,"* 2, 2nd edit.; 4 Steph. Com. 355, 2nd edit.).

V. *Appeals*.—Questions of law in criminal cases may be submitted to the consideration of the judges at Westminster, by a special case which is to be signed by the judge trying the case, and transmitted to the court above. This was formerly done on trials before judges of assize, but not at sessions, but now a case may be stated from any criminal court (12 Jur. 942). This is by the late act 11 & 12 Vict. c. 78 (see 1 Law Stud. Mag. N. S. 13; see also pp. 16, 17, 102). The decisions of the Court of Appeal are final, and no writ of error can be brought (Reg. v. Faiderman, 4 Cox's Crim. Cas. 359).

VI. *Central Criminal Court*.—The Central Criminal Court is a court of oyer and terminer and gaol delivery, and accordingly tries prisoners and others accused of offences similar to those tried at the assizes, including capital felonies, and also including offences committed on the high seas where the prisoner is in Newgate (4 & 5 Will. 4, c. 36; 4 Steph. Com. 362, 2nd edit.).

VII. *Judges' commissions*.—The commissions under which the judges of assize try criminals are those of oyer and terminer, and of gaol delivery. The words of the commission of oyer and terminer are "to inquire, hear, and determine," so that by virtue of this commission they can only proceed upon an indictment found at the same assizes, for they must first inquire by means of the grand jury, before they are empowered to hear and determine by the petit jury. The commission of general gaol delivery enables them to try and deliver every prisoner who shall be in the gaol, when they arrive at the circuit town (2 Bacon's Abr. p. 471, *et seq.* 7th edit.; 4 Black. Com. 270). The judges' commission of gaol delivery applies only to untried prisoners in the gaol, and not to untried prisoners in houses of correction. If a prisoner be committed to the gaol for trial at the quarter sessions, which are to be held after the assizes, the judge at the assizes will discharge him upon his own recognizance (Reg. v. Aslett, 2 Car. and Kirw. 596). Where a statute creates a new offence, and limits it to be tried before justices of oyer and terminer only, the quarter sessions cannot try it; for though justices of the peace are authorised to hear and determine, they are not what the law intends by justices of oyer and terminer: that commission being a distinct commission (Dickinson's Quart. 130, 4th edit.).

VIII. and IX. *Quarter sessions*.—The jurisdiction of the quarter sessions is exercised over criminal matters of inferior importance not punishable by transportation; the 5 & 6 Vict. c. 38, enumerates

several offences which are not to be tried at the sessions (see Key, div. "Criminal Law," p. 5, 2nd edit.) They have jurisdiction over offences relating to games, highways, in appeals respecting the licensing of alehouses, the maintenance of bastard children, the settlement of the poor, servants' wages and apprentices (4 Steph. Com. 365, 2nd edit.) Indeed, it is said in Dickinson's "Quarter Sessions," by Talfourd (pp. 153, 186, 188, 551, 4th edit.), that in general the sessions have an original jurisdiction to do whatever may be done by two magistrates, except where the statute empowering the latter to act gives an appeal to the sessions (Key, div. "Criminal Law," pp. 5, 6, 2nd edit.)

X. *Appeal from sessions*.—Criminal cases at quarter sessions are reviewed by a special case, as mentioned above, No. V.

XI. *Appeal—Conviction*.—A special case being stated and signed by the judge, the original case with seventeen copies must be delivered to the clerk of the Court of Appeal at the Exchequer Chamber, Westminster, at least four days before the day appointed for the sitting of the said court of appeal. The case must briefly state the question or questions of law to be reserved, and such facts only as raise the question or questions submitted (13 Jur. 41). No case is to be heard on any demurrer to the pleadings. Notice of argument must be given to the clerk of the court at least two days previously to the sitting of the court (Reg. Gen. 1 June, 1850; 4 Cox's Crim. Cas. Append. p. xi.) The court has no authority to deal with judgments on demurrer, but it has with objections taken in arrest of judgment (2 Abr. Crim. Law Cas. p. 27; Reg. v. Martin, 13 Jur. 368).

XII. *Magistrates*.—Magistrates are appointed by the Queen's special commission under the great seal (Key, div. "Criminal Law," p. 9, 2nd edit.; 5 Burn's Just. by D'Oy. and Will. p. 20).

XIII., XIV., and XV. *Mandamus*.—The writ of *mandamus* is denominated a prerogative writ, and is in the form of a command as from the Queen herself. It is issued from the Court of Queen's Bench, and is directed to any person, corporation, or inferior court of judicature (as to justices of the peace, see 11 Jur. Dig. 119; 11 & 12 Vict. c. 44, s. 5), within the crown's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the Court of Queen's Bench has previously determined, or at least supposes, to be consonant to right and justice. It lies to compel the admission or restoration of the applicant to any office or franchise of a public nature, whether spiritual or temporal; to academical degrees; to the use of a meeting-house, or the like; and it will be also granted for the production, inspection, or delivery of public books and papers; to compel public companies to summon a jury to assess compensation for lands

taken under their acts (12 Jur. 978); for the surrendering of the regalia of a corporation; to oblige bodies corporate to affix their common seal; or to compel the holding of a court, or to proceed to an election in corporate and other public offices (11 Geo. 1, c. 4, and 7 Will. 4 and 1 Vict. c. 78, s. 24; *R. v. Mayor, &c., of London*, 1 Term Rep. 146; *R. v. Leyland*, 3 Man. and Selw. 184; *R. v. Norwich*, 1 Barn. and Adol. 310). It also issues to the judges of any inferior court (even the new County Courts, Key, div. "Common Law," p. 27, 3rd edit.; 18 Law Tim. p. 98), commanding them to do justice according to the power of their office, whenever the same is delayed. In fact, the writ, when considered as a prerogative writ, issues from the Queen's Bench, where relief is required in respect of the infringement of some public right or duty, and where no effectual relief can be obtained by an ordinary action at law (*Reg. v. Hull and Selby Railw. Co.* 6 Qu. Ben. Rep. 70; 3 Steph. Com. 662, 2nd edit.) It is no objection to a writ issuing that an indictment may be preferred (*R. v. Severn Railw. Co.* 2 Barn. and Ald. 646; 1 Chit. Gen. Practice, 789). A *mandamus* will not be issued against a ministerial officer to compel him to obey an order of the quarter sessions, except where he is a merely nominal party (*ex parte Bottom*, 13 Jur. 680). There is a writ of *mandamus* for the examination of witnesses in the colonies, &c., which may issue from any one of the superior courts (Pract. Com. Law, 209, 210). The successful party is entitled to his costs (see *Reg. v. Surrey*, 19 Law Journ. N.S. M.C. 171; S.C. 14 Jur. 457). The writ of *mandamus* is obtained from the Queen's Bench on rules nisi and absolute, founded on affidavits, though under particular circumstances a rule absolute is sometimes issued in the first instance. The writ of *mandamus* requires the party to whom it is directed either to do the thing required or to signify some reason to the contrary (except where a *peremptory mandamus* is issued in the first instance). This is done by what is called a return to the writ. If the person to whom the writ is directed makes no return, he is punishable for his contempt by attachment. If, on the other hand, he makes a return, and it be found either insufficient in law, or false in fact, there then issues in the second place a *peremptory mandamus* to do the thing absolutely to which no other return will be admitted (*R. v. Ledgard*, 1 Qu. Ben. Rep. 616), but a certificate of perfect obedience and due execution of the writ (see 1 Abr. Crim. Law Cas. 20). In all cases of *mandamus*, the return may be pleaded to or traversed by the prosecutor, and his antagonist may reply, take issue, or demur; and the same proceedings may be had as if an action on the case had been brought for making a false return, and after judgment obtained for the prosecutor, he shall have a peremptory writ of *mandamus* to compel his admission or restitution, which

latter, in case of an action, is effected by a writ of restitution (11 Coke's Rep. 79). In addition to which, it is enacted by 6 & 7 Vict. c. 67, that the prosecutor objecting to the validity of the return, shall do so by way of demurrer to the same, in like manner as in personal actions, and thereupon the writ, return, and demurrer shall be entered on record, and the court shall adjudge either that the return is valid in law, or that it is not valid in law, or that the writ of *mandamus* itself is not valid in law; and if it adjudge that the writ is valid, but the return invalid, shall award a peremptory *mandamus*, and shall also, in any event, award costs to be paid to the successful party.

DEBATING SOCIETIES.

BIRMINGHAM LAW STUDENTS' SOCIETY.

January 18, 1854.—Moot Point, No. 143.—Can an action for use and occupation be maintained against a lessee of premises who has not entered? (Gregory v. Badcock, 2 Smith, 18; Pinero v. Judson, 6 Bing. 206, L. J. 1830, C. P. 19; Smith v. Twoart, 2 M. and G. 841; Izon v. Gorton, 7 Scott, 537; Atkins v. Humphrey, L. J. 1846, C. P. 120; Low v. Ross, L. J. 1850, Ex. 318; Gibson v. Kirk, 10 L. J. (N.S.) Q. B. 297; Edge v. Trafford, 9 L. J. 1831, Ex. 101; Jones v. Reynolds, 7 C. and P. 335; Towne v. D. Hemrich, 22 L. J. C. P. 219; Chitty on Cont. (Ed. 1853) Tit. Use and Occupation; Addison on Cont. vol. i., p. 403).

The action, either of debt or assumpsit, for use and occupation, has long been a favourite and convenient remedy for the recovery of rent due upon demises not under seal, *i.e.*, leases or tenancies coming within the operation of the second section of the Statute of Frauds. It is a more convenient form of action than, and has almost entirely superseded the old form of *debt for rent*; in the latter case it was necessary to set out the rent reserved, the period when it became due, and generally the terms of the tenancy, and in certain cases to state what powers of leasing the landlord possessed; whilst in the former case the tenant is merely charged in respect of his occupation, it having been repeatedly held unnecessary to set forth any demise of the premises, or for what term, or at what rent, they were demised, or how long the defendant had occupied, or at what period, or for what space of time, the sum claimed for occupation became due (King v. Fraser, 6 East. 354); all that need be stated is, "that the defendant is indebted to the plaintiff for use and occupation of certain premises of the plaintiff, at the request of the

defendant by him occupied for a long time" (Comyn, Land. and Ten. p. 431.)

The question, as suggested by the moot point, has frequently arisen whether this action will lie before entry by the tenant upon upon the premises. It appears to be now clearly established that it will not. It was argued, on the other side, that the statute 11 Geo. 2, c. 19 is sufficiently comprehensive in its terms to enable a landlord, who has verbally agreed to let to a tenant who has agreed to take, to recover, although the tenant may never have taken possession either actually or constructively. The object of this statute, however, was simply to remove the difficulties that, previously to its passing, existed in bringing the action of *assumpsit* for use and occupation. Before the statute was passed, it was held that *debt*, and not *assumpsit*, was the proper form of action for use and occupation, inasmuch as rent savours of the realty, and *assumpsit* is merely a personal remedy; and that if, in an action of *assumpsit*, the defendant produced upon the trial a written agreement, showing the terms of the tenancy, the plaintiff could not recover, as it was an agreement concerning an interest in land, for which *assumpsit* would not lie. The statute enacts that "it shall be lawful for the landlord, or landlords, when the agreement is not by deed, to recover a reasonable satisfaction for the lands, &c., held or occupied by the defendant, or defendants, in an action on the case for use and occupation, of what was so held or enjoyed; and if, in evidence on the trial of such action, any parole demise, or any agreement (not being by deed), whereon a certain rent was reserved, shall appear, the plaintiff in such action shall not, therefore, be nonsuited, but may make use thereof as an evidence of the quantum of the damages to be recovered." It was contended that the words "held or occupied" were sufficient to establish a liability on the part of a person agreeing to occupy, although he had never entered upon the premises; and in support of this view the first four cases above cited were relied upon. Upon examination, however, it will be seen that those cases do not establish that position, but are decided upon, and have reference only to the peculiar state of circumstances in each case. Gregory v. Badcock decides that *assumpsit* will lie against A., who, having agreed to rent lands, had in fact never occupied himself, but had suffered B. to *enter and occupy* them as his tenant. In Pinero v. Judson, it is decided that actual occupation during the whole of the time is not necessary; but it is there said, by Burroughs, J., that "actual occupation is not necessary; legal possession is sufficient, and the plaintiff had possession enough to sue for trespass," so that it must be presumed that the tenant had entered. In Smith v. Twoart, it appears that, although the defendant had never actually occupied, he had taken possession by his agent. The dictum

of Tindal, C. J., in *Atkins v. Humphreys*, was much relied upon; it will be observed that that was a case where the executors of a deceased tenant who had occupied disputed their liability to pay rent accruing after his death, and it was held that they were liable *de bonis testatoris* until the legal expiration of the tenancy; this cannot be said to be a case strictly in point, as possession had been taken and occupation had by the tenant, and the executors can only be regarded as his assignees.

Most of the other cases above cited are direct authorities in the negative. They not only decide that actual entry must be made upon the premises, but point out what is a sufficient entry to support the action. In the case of *Jones v. Reynolds*, it was decided that going upon the lands, and boring holes for the purpose of ascertaining whether there were valuable mines under them, was not a sufficient taking of possession to give the plaintiff a right to sue for use and occupation. In the case of a parol demise, when the tenant has taken possession, although he may afterwards, before the legal expiration of his tenancy, cease to occupy, the landlord has only to prove the taking possession, and that the tenancy was not legally determined, either by notice to quit or effluxion of time; but where the tenant has never entered, or done anything to establish a tenancy, the only evidence the landlord could bring would be the contract of letting, which would be ineffectual, as the Statute of Frauds enacts (section 4) that a contract concerning any interest in lands must be in writing. In the case of a written agreement, although the rent, or an equivalent, might be recovered in another form of action, it appears equally clear that evidence of a taking possession must be adduced to support an action for use and occupation. The cases of *Edge v. Trafford* and *Lowe v. Ross* may be referred to as fully explaining the law upon this important question.

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FRANCIS SANDERS, Cor. Sec.

MOOT POINTS.

No. 29.—*Distress for Rent—Set-off.*

Suppose B. is tenant to A. of a farm at the rent of £60 per annum, and A. dies. Shortly after his death a half-year's rent becomes due from B., and the executors of A. distrain upon the land for the same (£30). But A. at the time of his death is indebted to B. in the sum of £40 for cattle sold to him.

What advantage has B. under these circumstances with regard to his right of set-off?

F. T. D.

No. 30.—*Bankruptcy—Trader.*

The 65th section of the Bankrupt Law Consolidation Act, 1849, after enumerating the persons liable to become bankrupts, provides that no member of or subscriber to any incorporated, commercial, or trading company, established by Charter or Act of Parliament, shall be deemed *as such* a trader liable to become bankrupt. On reading the case, Cannan and others, assignees of Garnham, a bankrupt v. Smith, 21 Law Times Rep. p. 230, I was much surprised to find that the bankrupt had been adjudicated such solely in respect of two shares he held in the East of England Bank. He was a farmer, and had never carried on any other business, but as a shareholder in the said bank he had participated in the profits and received dividends on his shares.

How can I reconcile this with the proviso for exception of shareholders in an incorporated trading company from the operation of the bankrupt laws?

F. T. D.

No. 31.—*Annuity—Property-tax and Legacy Duty.*

A. B., by his will dated 4th April, 1844, gave and bequeathed to C. D. "for her life one annuity of twenty pounds per annum, to be paid half-yearly, *free of all deductions, charges, or impositions whatsoever.*" Can the person on whose property the annuity is charged deduct property-tax and legacy-duty in this case?

A SUBSCRIBER.

No. 32.—*Lessee of Mortgagor.*

Suppose a mortgagor grants a lease to a tenant without the consent of the mortgagee, can the tenant show that the mortgagor had no power to grant the lease and get clear of the lease.

JOSEPH B. BETTS.

No. 33.—*Withdrawing Execution—Re-entering.*

A., as attorney for C., sues B. for debt due on mortgage to C. upon which a *fi. fa.* is sent into possession. B. then conveys over certain property to A. in trust to sell and pay mortgage debt, upon which execution was withdrawn, but before A. advertises property for sale, B. contracts to sell same to D., but B.'s wife being entitled to dower refuses to execute. Can C. re-enter his execution?

F. W. HOYLE.

No. 34.—*Game.*

Do wild ducks come within the catalogue of animals denominated "game?"

C. J. G.

No. 35.—*Infant—Liability of Father.*

A., an infant, contracts debts to a considerable amount, which B.,

his father, discharges, but gives notice by advertisement to the tradesmen of the town that they for the future give A. credit at their own risk. A. manages to get into a tradesman's debt to a large amount, and refuses to pay. Is the father liable?

C. C. ELLIS (Ruthin).

No. 36.—*Devise—Chief Rent, by whom to be paid.*

A. by his will, after directing payment of all his just debts, &c., gives and bequeaths unto his wife M. all his household goods, plate, pictures, carriages, horses, &c., absolutely for her own use and benefit; and he gave and bequeathed unto his said wife M. an annuity or yearly sum of £500, so long as she should continue his widow unmarried; and in case of her second marriage, he directed the said annuity to be reduced to £200 per annum, the same respectively to be paid by quarterly payments, and gave directions to his trustees as to the investment of moneys for the purpose of securing the same. And testator then proceeds as follows:—"I give and bequeath unto my brothers B. and D. all that my messuage or dwelling-house, called H., with the garden land, coach-house, stables, lodge yard, and other appurtenances thereunto belonging, situate at H. aforesaid, now in my own occupation, to hold he same unto the said B. and D., their heirs and assigns, upon trust, to permit and suffer her my said wife to hold and enjoy the same for and during so long as she shall continue my widow, and not marry again, and during such time only as she my said wife shall make the same premises her residence, but not for her to set or let the same."

The premises so devised to M. the wife are all freehold, but a portion of the land is subject to a yearly freehold rent charge or chief rent of £40. The land on which the mansion itself stands is not, it is believed, subject to any portion of this rent, but it arises from a part of the land which constitutes the garden.

Who are the parties legally liable to pay the said chief rent, M. the wife or the executors? and if the latter, and they should refuse or neglect to pay, and in consequence thereof the premises should be distrained upon, what are M.'s remedies against them?

HENRY REDDISH (Stockport).

No. 37.—*Apprentice—Married Woman.*

A., a widow, carrying on a trade, married B., who in a few years after their marriage went off to Australia, and it is not known if he is alive or not. A. continues to carry on the trade, and wishes to take an apprentice. She says she has had one bound to her since B. went off, but the mooter conceives that no indenture of appren-

ticeship will be valid or binding upon her. It must be remarked that B. has only been gone about two years.

HENRY REDDISH (Stockport).

No. 38.—*Settlement by Woman about to be Married.*

A feme sole about to be married, entitled to real and personal property, conveys and assigns it by way of settlement to a trustee upon certain trusts in the deed set forth; the intended husband is not made a party, but the trustee gives him notice of the settlement. Is the above equally valid as a settlement of the feme sole's property without the intended husband's consent as though he had concurred therein? If not, why? and what authorities are there on the subject? The mooter contends that the feme sole, having an absolute estate in the premises, has the power to dispose of them as she thinks fit—*ergo*, that the above operates as a settlement upon the trusts therein mentioned.

H. R.

ANSWERS TO MOOT POINTS.

No. 14.—*Legacies—Deficiency of undisposed of personality (anti, pp. 59, 110).*

With regard to the questions arising upon this moot point, I beg to express my entire concurrence with the observations made by W. Y. P., except so far as respects the right of the pecuniary legatees to call for payment out of the leaseholds specifically bequeathed, in case the executor, having realised a sufficient sum from the sale of the furniture, &c., to pay, not only the funeral expenses, but also the pecuniary legacies, had, instead of doing so, applied such sum in discharge of the general debts of the testator. At first sight it would certainly appear that the case comes within the principle upon which assets are marshalled, but I think a little consideration will serve to show that the principle in question can have no application to the present case. By the terms of the will the testator, *after all his just debts and testamentary expenses are liquidated*, specifically bequeaths his leaseholds to his nephew and nieces. This I conceive, however, cannot possibly be construed into a direction that the leaseholds are to be the *primary* fund for payment of debts, and consequently, such leaseholds being specifically bequeathed, cannot be resorted to until the general assets are exhausted. My construction of the clause referring to payment of debts is, that the words are simply inoperative, creating no new rights either in favour of the creditors or as between the legatees, being in fact merely declaratory of what

the law itself provides. As in case of a deficiency of general assets for payment of debts, specific legacies are not liable to abate along with general pecuniary legacies, and as there appears to be nothing on the face of the will showing an intention that the ordinary rule of law should not apply, I certainly think that the pecuniary legatees would not be entitled to come upon the leaseholds specifically bequeathed; to the extent to which the general assets might have been absorbed by payment of the testator's general debts.

I feel compelled to express my entire dissent from the view of the subject taken by Mr. Murray, and must at the same time confess my inability to perceive how his conclusions are supported by the authorities and arguments he adduces. The case of *Forster v. Cook* (3 B. C. C. 347) cited by him, presents a simple illustration of the application of the doctrine with respect to marshalling assets, and it will be perceived that there a new right was created in favour of the creditors, viz., a right to resort to the real estate for payment; but with regard to this position that the doctrine applies *à fortiori* to the present case on account of the property being *personal*, I contend that, for that very reason, and from its not being constituted the primary fund, the doctrine has no application at all. As to the case of *Long v. Short* (1 P. Wms. 403), also cited by him as an authority, I make no observation, for I must confess, that although I have taken some pains to do so, I have been quite unable to discover its bearing upon the subject under consideration. After stating what is indeed very true, viz., that as all property is now liable for payment of debts, but personalty primarily, so there can be no doubt that the leaseholds are liable although specifically bequeathed, Mr. Murray proceeds to express himself satisfied, from the cases previously cited by him, that the pecuniary legatees are entitled to have their claims discharged from the same source (*i.e.*, the leaseholds specifically bequeathed), *although they must contribute pro rata with the nephews and nieces towards the payment of debts*. This conclusion, however, I must characterise as decidedly enigmatical, and as involving a contradiction upon the face of it, for if after the general assets are exhausted, the specific and pecuniary legatees must, as he states, contribute *pro rata* towards payment of debts, it appears unsatisfactory to say that the pecuniary legatees shall *then* come upon the leaseholds for the amount of their legacies. The conclusion is also in direct opposition to the rule of law before noticed, that in case of deficiency of assets for payment of debts, a specific legacy is not liable to abate with pecuniary legacies.

Perhaps Mr. Murray may be induced to reconsider his opinion, and should he feel inclined to maintain the position which he has advanced, I shall have great pleasure in arguing the matter with

him, unless, indeed, either the mooter of the question or W. Y. F. should consider himself called upon to do so. STUDENS.

No. 16.—*Lien—Innkeeper* (vol. vi. N.S. p. 101).

In the case referred to by the mooter it was left an open question whether an innkeeper has or has not a lien on a carriage brought to his hotel by a guest for the board and lodging of the guest?

I should, however, be inclined to think he has. In Stephen's Commentaries, vol. ii., p. 74, I find that an innkeeper is not entitled "after charges have been incurred to detain the person of his guest or strip off his clothes for the payment of them, though he has by law a lien on such *of the other* goods of the defaulter as were brought by him into the inn." The note refers to two cases, viz., *Sanbolf v. Alford*, 3 Mee. and W. 248; and *Proctor v. Nicholson*, 7 Car. and P. 67. These are not within my reach at present, but may be of use to others seeking information. J. B. BETTS.

No. 33.—*Power to Appoint—Mortgage, &c.* (*antè*, p. 20).

This point has been erroneously stated. A. exercised the power in favour of B., and not *vice versa*, as appears at page 120.

The mooter considers that the power was *not exceeded* as a mortgage—being merely "a pledge for the money borrowed" it only operates as a revocation *pro tanto*. R. E.

No. 23.—*Tenancy in Common or Joint Tenancy* (*antè*, p. 103).

I do not think that much would turn upon the point of the conveyance being by deed, as distinguished from a devise by will, except that words in a will would be more favourably construed with regard to tenancy in common than similar words in a deed. Explicitness of declaration is not essential to create a tenancy in common, and the courts do not favour joint tenancy.

The words, "equally to be divided" and "share and share alike," are adequate to sever the tenancy, even in the instance of a deed (*Rigden v. Vallier*, 2 Ves. sen. 252; and see *Doe v. Vaughan*, 1 Dowl. and Ryl. 52; and *Clayton v. Lowe*, 5 B. and Ald. 636). Blackstone says in vol. ii., p. 181, "Joint-tenants are said to be seised *per my et per tout*, by the half or moiety, and by all, that is, they each of them have the entire possession, as well of every parcel as of the whole."

It seems to me that the words, "equally to be divided between them," not creating a tenancy in common, is in direct contradiction to the above proposition, that joint-tenants each of them have the entire possession. F. D.

No. 123.—*Set-off* (vol. vi. p. 114).

I think that if Mr. J. F. Richards will refer to the authority cited by me at vol. v., p. 643, viz., *East Anglian Railway Company v. Lithgoe*, 10 C. B. 726, he will find it supports the conclusion that the set-off in the case supposed would be good. The reason is obvious, for the master would sue in his own right (and not as the agent of B.) for money had and received by the clerk to his (the master's) own use. It would thus be a case of *mutual legal debts*, and as the object of the statute of set-off was to prevent the necessity for cross actions between the same parties, and as it is obvious that the clerk might sue his master for the amount of salary due to him, the application of the rule in this case seems incontestable. On the other point I still adhere to my original opinion, notwithstanding the authorities cited by Mr. Cordes, at vol. v., p. 699, which, I think, are not in point; the payment to the agent in those cases having been void *ab initio* (see 1 Addison on Contracts, p. 425).

T. G.

No. 29.—*Partnership—Lunacy* (*antè*, p. 119).

I am of opinion that the *sole fact* of the lunacy of one of the partners would not *of itself* be sufficient to cause a dissolution, but it would most probably have great weight in inducing a court of equity to decree a dissolution, more especially should there be but slight hopes of the lunatic party returning to soundness of mind (*Waters v. Taylor*, 2 Ves. and Bea. 303; *Sayer v. Brunet*, 1 Cox. 107). The question of course depends also upon the time mentioned in the articles of partnership for the continuance of it, for a partnership for an indefinite period may be dissolved at any time by any of the parties (*Peacock v. Peacock*, 16 Ves. 49). So that if the lunatic's friends wished for a dissolution I apprehend it might be easily brought about.

C. C. ELLIS (Ruthin).

No. 30.—*Absent Husband—Wife's Second Marriage—Liability of Clergyman* (*antè*, p. 129).

In this case the husband had been absent and unheard of for seven successive years, so that A. had clearly a right to marry again (*Stephen's Com.* vol. 4, p. 339), and therefore I certainly think that the clergyman would stand in exactly the same position as if A. had been a spinster. If, "*au contraire*," he had married the parties, the husband's return would not subject him to any responsibility provided, of course, A. had made the proper declaration as to her husband's having been unheard of, although such second marriage would be void, though not subject to the penalties of bigamy. As regards the proceedings against the clergyman, I conceive that

"refusing to serve a public office" *without any valid reasons* is an offence cognisable at common law, and punishable with fine and imprisonment.

C. C. ELLIS (Ruthin).

No. 23.—*Tenancy in Common, or Joint Tenancy* (*antè*, p. 103).

I quite agree with the mooter in this point, that the grantees take as *joint tenants*.

"To create a joint tenancy the estate must be acquired by two or more persons, in the same land, by the same title (not being a title by descent), at the same period and without any limitation by words importing that they are to take in distinct shares" (Stephen's Com. vol. 1, 324). This being so, a glance at this point shows that it has the requisitions of a joint tenancy.

C. C. ELLIS (Ruthin).

No. 32.—*Power to Sell within Limited Time* (*antè*, p. 120).

It appears to me quite clear that the power of sale would be properly exercised by the executor if the sale took place within the time mentioned, more especially if the sale was not completed until near the end of the limited year.

Though not distinctly expressed in the will, it must be presumed that it was not the intention of the testator that any great length of time should elapse between the sale and the completion of the conveyance. But it must also be presumed that as he gave a considerable time for the sale (*viz.*, a year), he did not think it necessary that there should be any great despatch used. I therefore certainly think that the power would be sufficiently exercised if the conveyance was not completed in the year. Although it would not be so if any considerable time after the year was allowed to pass before the business was finished.

C. C. ELLIS (Ruthin).

No. 28.—*Libel—Executors suing* (*antè*, p. 104).

I apprehend there can be no doubt as to the correctness of the answer given by the editors of the LAW STUDENTS' MAGAZINE to question 9, Common Law, Michaelmas Term Examination. In the case of Chamberlain v. Williamson, 2 Aule and Selwyn, 408, Lord Ellenborough said, "Executors and administrators are the representatives of the personal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate;" and in Williams' Law of Executors and Administrators, 628, I find that an executor or administrator shall not have actions of assault and battery, false imprisonment, slander, &c.

HENRY REDDISH (Stockport).

No. 31.—*Legacies—Presumption of Satisfaction* (*anté*, p. 120).

In Roper's Law of Legacies, v. i., p. 791, I find that although the Statute of Limitations does not bind courts of equity by express terms so as to enable a defendant to plead it in bar to a suit for a legacy, yet for the sake of convenience they have adopted its provisions by analogy in many instances in which fraud made no ingredient. Upon this principle it has been determined that a legacy not demanded for forty years should be considered *prima facie* as satisfied; but the presumption is not so absolute as to support a demurrer to a bill for such legacy; for the point of satisfaction is an inference only arising from the length of time which has elapsed from the period the legacy became payable, and which may be repelled by clear, strong, and relevant evidence. In *Jones v. Turberville*, 2 Ves. jun. 11, which was a bill brought by the second husband of a legatee after her death, it was resisted on the ground of presumptive payment arising from the length of time which had elapsed without any demand, *which was above forty years*, and because the representatives, both real and personal, and all the persons who could throw any light upon the question, were dead. Lord Commissioner Eyre remarked that it was a presumption of fact in legal proceedings before juries that claims the most solemnly established upon the face of them would be presumed to be satisfied after a certain length of time. *Et vide* *Pickering v. Lord Stamford*, 2 Ves. jun. 272, 4 Bro. C. C. 214, decided by Lord Alvanley, M.R., acknowledging the propriety of the decision of the Lords Commissioners in the case last stated, and said if the case before him had been that of a legacy he would have been of opinion that a bar had arisen from the length of time which had elapsed, upon the ground of presumptive satisfaction. *Et vide* *Sug. V. and P.* vol. ii. (10 ed.) p. 362 *et seq.*

And it would seem that twenty years would, by analogy to the Statute of Limitations, raise the presumption of payment of a legacy (Roper, vol. 1, p. 792). I think, therefore, that the purchaser may safely complete in this case, on the assumption that the legacies are satisfied,

HENRY REDDISH (Stockport).

No. 28.—*Libel—Escutours suing* (*anté*, p. 104).

In Chitty's Commercial and General Lawyer, p. 962, I find as follows: "An action may be supported for a libel reflecting on the memory of the dead; *but it must be alleged in the declaration, and proved to the satisfaction of the jury that the author intended by the publication to bring dishonour and contempt on the relations of the deceased*," which seems quite to bear out the Editor of the Law Student's Magazine in his answer of the question, as there is here a

special proviso that the reputation of the *living as well as that of the dead* is endangered by the publication. JUNIUS (Huddersfield).

No. 23. *Tenancy in Common, or Joint Tenancy* (antè, p. 103).

I beg to refer Mr. Cordes to Powell on Devises, by Jarman, vol. ii. p. 371. "It has long been settled that the words "*equally to be divided*" will create a *tenancy in common*.

JUNIUS (Huddersfield).

No. 29.—*Partnership—Lunacy* (antè p. 119).

I have looked into a good many cases on this point the general tendency of which seems to be, that when one of a firm becomes insane, the court of equity will decree a dissolution, but that the lunacy *de ipso* does not work a dissolution.

JUNIUS (Huddersfield).

No. 28. *Tenancy in Common, or Joint Tenancy* (antè, p. 103).

I am of opinion that A. and B. take as joint tenants, for, if an estate be given to a plurality of persons without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A. and B. and their heirs, this makes them immediately joint tenants in fee of the lands. An estate given to A. and B. *equally to be divided between them* by deed creates a joint tenancy (1 Eq. Cas. Abr. 291). Yet, in wills, it is certainly a tenancy in common (3 Rep. 89; 1 Ventr. 32).

G. G. NORRIS.

No. 27. *Next of Kin* (antè, p. 104).

I am inclined to differ in opinion with the mooter of this point. I certainly think that the nephews and nieces of the testator are entitled under the term "next of kin." I consider it is placing them in the same position as if the testator had died intestate as to his personalty, and it is strictly laid down if any brother or sister shall have died in the lifetime of the intestate leaving children, shall stand in *loco parentis* (Lloyd v. Tench, 2 Ves. sen. 215).

G. G. NORRIS.

No. 19. *Baron and Feme—Leaseholds—Rent reserved upon Underlease* (vol. vi. N.S. p. 102).

I agree with the mooter of this point that the rent accrued since the decease of the husband is payable to his administrator.

The will of the wife in this case could have no effect, for the husband, by surviving her, became entitled to her reversionary interest in such chattels real, just the same as if the underlease had not been granted they would have become his absolute property.

J. B. B.

No. 16.—*Lien—Innkeeper* (*antè*, p. 101).

There seems to have been no decision on this question since it was left open in *Farrell v. Crawley*. Coleridge, J., in his decision in that case, said, "The right of lien on a carriage is just the same as that which exist in the case of a horse;" and in *Robinson v. Waller* (1 Rolle. 449), though the court were divided as to whether an innkeeper has a lien on a horse or other chattel which is not the property of the person from whom he receives it, yet the judges who were in favour of the lien existing were of opinion that it existed only in respect of the keep of the horse, and not of the guest; and in *Bac. Abr. tit. Inn.*, I find the following:—"If a horse be committed to an innkeeper, it may be detained for the meat of the horse, but not for the meat of the guest; for the chattels are only in the custody of the law for the debt that arises from the thing itself, and not from any other debt from the same party, for the law is open for all such debt, and doth not admit private persons to take reprisals." Judging, therefore, from the principle here laid down, and from the principle of lien laid down in *Farrell v. Crawley*, I am of opinion that an innkeeper has not a lien on a carriage brought to his hotel by a guest for the board and lodging of the guest, but only in respect of his charges for the standing room of, and labour bestowed on, the carriage.

J. F. C. (Walsall).

No. 24.—*Gratuitous Bailment—Loss by Theft* (*antè*, p. 103).

In vol. ii. of Stephen's Commentaries (p. 71) the following is one of the general rules for estimating the responsibility to which bailees are subject:—"Upon a bailment from which the bailee derives no benefit, nothing short of *gross negligence* will make him responsible;" and "a bailee is not liable for a robbery or other casualty in no degree attributable to his own fault." I conceive the defendant's plea in the case mooted would disclose a good defence to the action.

J. F. C. (Walsall).

No. 132.—*Statute of Limitations*.

The debt is undoubtedly barred, the exception contained in the 4 Anne, c. 16, s. 19, only extending to the case of a debtor who is abroad at the time when the cause of action accrued. If he is within the realm at that time, but goes abroad afterwards, the debt is barred at the expiration of six years from the time when it became due, for "the time of limitation having begun to run, nothing stops it" (*Cotterell v. Dalton*, 4 Taunt. 830; *Doe v. Shaen*, Selw. N.P., i., 147 (n); *Addison on Contracts*, ii., 1330).

W. P. P. is clearly mistaken in saying that it is the creditor's, not debtor's, absence from the country that takes the demand out of the

statute; for the absence of *either* has that effect, provided that the cause of action accrues during such absence, the one by the operation of 21 Jac. i., c. 17, s. 7, the other by that of the above cited statute. *Et vide* Addison on Contracts, *ubi sup.*

LUCAS CORDES (Newport).

DIGEST OF RECENT CASES.

MORTGAGE.—*Mortgagor in possession—Making distress on tenants—Bailiff of mortgagee.*—Where a lessor, having mortgaged his reversion, is permitted by the mortgagee to continue in the receipt of the rent incident to that reversion, he, during such permission, is, *præsumptione juris*, authorised, if it should become necessary, to realise the rent by distress, and to distrain for it in the mortgagee's name as his bailiff. Where, therefore, a mortgagor in possession distrained for rent accruing due after the mortgage, but the notice of the distress described the rent as due to himself: Held in replevin that he could make cognisance as the bailiff of the mortgagee. *Trent v. Hunt*, 9 Exch. Rep. 14; S.C. 17 Jur. 899; 22 Law Journ. N.S. Exch. 318).

DEVISE.—*Failure of issue, to what period or event referable.*—When the ulterior limitations in a will are made to depend upon a failure of issue of the testator, and there are found amongst the ulterior limitations provisions which could not reasonably be meant to depend upon a general failure of issue, the will is to be construed as referring to a failure of issue at the death, and not to a general failure of issue. The fixing of the time of the death of living persons as the period of payment, is to be considered as inconsistent with the notion that the legacy was to take effect only on a general failure of issue. *Re Rye*, 10 Hare, 106; S.C. 16 Jur. 1128; 22 Law Journ. N.S. Chanc. 345.

DEVISE.—*Gift over on failure of class of legatees.*—It is a rule of construction that where there is a gift to some only of a class, and then a gift over upon failure of *all* the class, it is to be construed upon failure not of the whole class, but of those only who are specified before. *Bryan v. Mansion*, 5 De Gex. and Sm. 737; S.C. 17 Jar. 202; 22 Law Journ. N.S. Chanc. 233.

MORTGAGE.—*Tender of mortgage money and consequences of refusal to accept it.*—Upon the expiration of a notice to pay off mortgage money the mortgagees are bound to know and to state the amount due for principal, interest, and costs. And if the mortgagees refuse to receive the amount tendered by the mortgagor as due for principal, interest, and costs, they do so at their own risk. And

a sum having been tendered and refused, it was held, upon a claim to redeem, that the mortgagors were entitled to a decree for an account of the principal, interest, and costs, and that the interest (if the principal did not appear to have been lying idle) must be continued to the time of taking the account, and that if the sum tendered did not amount to the sum due, the plaintiffs must pay the costs; but if it exceeded the amount found due, the defendants must pay the costs. *Harmer v. Priestly*, 22 Law Journ. N.S. Chanc. 1041.

SPECIFIC PERFORMANCE.—*Performance in toto, not partially.*—It is fully settled that a contract cannot be specifically performed in part; it must be wholly performed or not at all. *Ford v. Stuart*, 15 Beav. 493; S.C. 21 Law Journ. N.S. Chanc. 514.

JUDGMENT.—*Enforcing in equity—Suing out *elegit*—General jurisdiction of equity.*—It was established by the case of *Neate v. Duke of Marlborough* (8 Myl. and Cr. 407; S.C. 1 Jurist, 939) that courts of equity would, on the ground of aiding the legal right, assist a judgment creditor to get at his debtor's land, but then such creditor must have pursued his legal remedies to the full extent, as for instance, in suing out and getting returned a writ of *elegit*, even though it was certain nothing would be got under it. This doctrine has lately been recognised and acted on, and the general jurisdiction of equity stated. It was decided that a court of equity will interpose to remove legal impediments out of the way of judgment creditors or for the preservation of the property, pending disputes at law as to the rights of judgment creditors; but the court does not supply or extend legal rights. In fact, the court only interferes in aid of the legal rights when the party has proceeded at law to the extent necessary to give him a complete title; and, therefore, where the plaintiff had obtained judgment, but had not sued out an *elegit*, it was held (conformably with *Neate v. Marlborough*) that he was not entitled to the aid of the court as against the freehold estate of the debtor; that he did not, under the statute 1 & 2 Vic. c. 110, s. 13, become entitled to such aid until the expiration of one year from the time of entering up his judgment, and that this being an objection that the plaintiff's title was incomplete, was therefore not removed by a resort to the jurisdiction of the court to relieve against fraud in respect to the freehold estate. *Smith v. Hurst*, 10 Hare, 30; S.C. 17 Jur. 30; 22 Law Journ. N.S. Chanc. 289.

NUISANCE.—*Equity jurisdiction—Injunction.*—The principle upon which a court of equity interferes by injunction in cases both of public and private nuisance, is the inadequacy of the remedy at common law; and it is on the ground of injury to property that this jurisdiction rests. *Per* Sir G. J. Turner, L.J., in *Attorney-General v. Sheffield Gas Consumers' Company*, 17 Jur. 677; S.C. 22 Law Journ. N.S. Chanc. 811.

NOTES OF RECENT LEADING CASES.

VOLUNTARY CONVEYANCES.—*Revocation of—For benefit of creditors* [*Smith v. Hurst*, 10 Hare, 30; S. C. 17 Jurist, 30].—A recent decision has drawn attention to the doctrine of courts of equity, as to the revocability of deeds by which debtors voluntarily make provision for payment of their debts, by vesting their estates in trustees. Mr. Hayes (Introd. to Convey. p. 351, 4th edit.), referring to some of the decisions which were reported about the time of the publication of his work, observed, "A train of recent decisions has established that where a man vests property in trustees for payment of his debts, not as matter of arrangement with his creditors, but as a mode of administering his estate convenient to himself, he may at pleasure revoke or vary the trusts, either by express declaration or by subsequent inconsistent acts (*Wallwyn v. Coutts*, 3 Mer. 707; 3 Sim. 14; 2 Russ. and M. 452, 454; *Garrard v. Lord Lauderdale*, 3 Sim. 1; 2 Russ. and M. 451; *Acton v. Woodgate*, 2 Mylne and K. 492). Unfortunately, these decisions do not furnish the practitioner with such distinct and satisfactory tests as enable him to determine in what cases (with reference to the fact of creditors being parties or not—to dealings or communications, contemporaneous or subsequent, by or with creditors—and to other circumstances) the deed, on being repudiated by the maker, may be safely treated as a nullity. The result of the authorities, so far as it can be collected, appears to be that the trusts of a deed of this kind must be considered as created by the debtor for his own accommodation, and as liable, like directions given to a consignee or agent respecting the application of the goods or funds of the principal (*Williams v. Everett*, 14 East, 582; *Scott v. Porcher*, 3 Mer. 652; *Fitzgerald v. Stewart*, 2 Russ. and Myl. 457), to be countermanded at any time before an actual appropriation. The most explicit judicial exposition of the doctrine states it thus:—"If a debtor conveys property in trust for the *benefit* of his creditors, to whom the conveyance is not communicated, and the creditors are not in any manner privy to the conveyance, the deed merely operates as a *power* to the trustees, which is *revocable* by the debtor, and has the same effect as if the debtor had delivered money to an agent to pay his creditors, and before any payment made by the agent, or communication by him to the creditors, had recalled the money so delivered" (*Acton v. Woodgate*, 2 Mylne and Kee. 492). And where several persons contract by way of arrangement between themselves for the settlement of an estate, their concurrence which

made, may also rescind or vary, the arrangement, while it yet rests *in fieri*; for third persons not parties have no equity to enforce such private and voluntary contracts; but this conclusion seems to flow rather from the old and settled distinction (2 Russ. and Myl. 453) between voluntary dispositions executed and executory, than from the doctrine of the modern decisions on trust deeds for creditors; on which decisions, however, the Vice-Chancellor in a recent case (*Ravenshaw v. Hollier*, 7 Sim. 3), involving the point in question, founded his judgment. So, "if two persons for valuable consideration as between themselves, consent to do an act for the benefit of a stranger, the stranger has not any right to enforce the contract as against the two, though each one might as against the other" (*Collyear v. Countess of Mulgrave*, 2 Keen, 81). It was almost of course that the principle which sustained a voluntary deed against the maker and his representatives would be considered as impugned by these decisions, which held out encouragement to every voluntary settlor to repudiate his own solemn act. Accordingly in the case of *Bill v. Cureton* (2 Mylne and Keen, 503), the settlor, a spinster, having vested stock in trustees in trust for her separate use for life, then for her children, and if no child for her next of kin, filed a bill against the trustees for a re-transfer of the stock; but Sir C. Pepys, M.R. (Lord Cottenham), very properly held that the author of the settlement was bound by it, inasmuch as a voluntary settlement, where the trust is actually created, is binding upon the settlor; a doctrine, he observed, not impeached by the above decisions, inasmuch as they proceeded upon the distinction which, though somewhat refined, had good sense for its foundation, that the debtor himself was the only cestui que trust, and therefore entitled to direct the application of his own trust fund (see also *Page v. Broom*, 4 Russ. 6). Still with respect to trust deeds for creditors, the subject is left in a state far from satisfactory, whether we regard the difficulty of arriving, through the medium of extrinsic evidence at the state of facts, as to the communication or privity, and the consequent danger of relying upon a second deed made in contravention of the first, or the difficulty of collecting the principle amidst the confusion of trusts and powers, revocation and resumption, grantee and agent. It may be thought that the "good sense" is less apparent than the refinement of a distinction which treats a conveyance upon trust for A., to whom the grantor owes no duty, as irrevocable, and a conveyance upon trust for a body of creditors composed of B. C. D., &c., to whom the grantor owes a duty of the highest obligation, as revocable,—not to insist that by making the deed ambulatory during the life of the grantor, we confound it with a testamentary disposition. It is feared that more litigation must yet arise before the *locus penitentiae* with which the grantor has been

indulged in these cases is reduced within definite limits. The remark of Sir C. Pepsy, M.R., in *Bill v. Cureton*, that "a man who without any communication with his creditors puts property into the hands of trustees for the purpose of paying his debts, purposes only a benefit to *himself* by the payment of his debts; his object is not to benefit his creditors; wherefore it would be a result most remote from the contemplation of the debtor, if it should be held that any creditor *discovering* the transaction should be able to fasten upon the property, and invest himself with the character of a cestui que trust,"—must not be supposed to import that a communication prior to or contemporaneous with the execution of the deed is essential to give the creditors an equity; for both the general principles applicable to voluntary deeds, and the particular language of the decisions in question concur in attributing that effect to an *ex post facto* dealing by the debtor *with* the creditors. Even with respect to settlements voluntary in their inception within the stat. 27 Eliz. c. 4, a dealing for value by the volunteer with the intent designed for him by the settlement, or a marriage contracted with him upon the faith or credit of the settlement, will exclude the statute. Though the debtor may "revoke" the trusts or "recall" the beneficial interest, he cannot in the absence of an express power of revocation defeat the *legal estate* of the trustees, who will rarely be advised to reconvey without the indemnity of a decree (see *Acton v. Woodgate*, 2 Mylne and Kee. 492). In the case of *Wilding v. Richards* (1 Coll. N.C. 655; S.C. 14 Law Jour. N.S. Chanc. 211), it appeared that the obligor of several bonds in which A., a solicitor, joined as surety, conveyed certain real property to A. upon trust to sell, and out of the proceeds of the sale to pay the bond creditors. The creditors did not execute or have any notice of the deed, and it was held that the deed was a mere deed of agency, and *not* binding in favour of the creditors, but that A. was entitled to retain the estates conveyed to him until he should be discharged from his liability as surety under the bonds. In the same case a deed of conveyance of land by a debtor to a person upon trust, for effectually securing the repayment of certain specific sums, due in respect of certain bonds mentioned in the deed, was held, under the circumstances of the case, to be binding on the debtor as between him and the creditors, although the creditors did not execute the deed.

Nor is this doctrine confined to courts of equity, for at law it has been decided that where the debtor conveys property in trust for creditors to whom the conveyance is not communicated, and the creditors are not in any manner privy to the conveyance, the conveyance operates not as an assignment, but only as a *power* to the trustee, which is revocable by the debtor (*Smith v. Keating*, 6 Com. Ben. Rep. 136).

The difficulties arising from the state of the law upon the above subject will appear very evident from a perusal of the judgment of Sir George Turner, in the case of *Smith v. Hurst*, above referred to. In this case it appeared that, by indenture, H., who was then indebted to several persons, and among others to one P., conveyed and assigned to P. certain real and personal estates, upon trust to manage and sell the same, and pay out of the moneys thence arising all expenses, and then satisfy the debts of H., or such of them as P. in his uncontrolled discretion should think fit, with an ultimate trust for H., his heirs, &c., absolutely. By the deed full power was given to P. to cut timber and to compromise debts, also to resign at any time the trusts, and it was provided that nothing therein contained should prejudice or affect a mortgage which P. had over part of the property, or his position as receiver; and a provision was made for his compensation. No other creditor of H. except P. was a party to the deed, or *aware of its existence until long afterwards*; and P. was not expressed to be made a party in the character of a creditor, but solely as a trustee. It was held by a court of equity that the indenture was revocable. Vice-Chancellor Sir George Turner, in the course of his judgment, said: "Many of the cases upon voluntary deeds were cited and commented upon in the argument of this case, and I have thought it right therefore to examine the authorities upon the subject. They appear to me to result in this, that in cases of deeds vesting property in trustees upon trust for the benefit of particular persons, the deed cannot be revoked, altered, or modified by the party who has created the trust; but that in cases of deeds purporting to be executed for the benefit of creditors, the question whether the trust can be revoked, altered, or modified, depends upon the circumstances of each particular case. It is difficult at first sight to see the distinction between the two classes of cases, for in each of the classes a trust is purported to be created, and the property is vested in the trustees. But I think the distinction lies in this, that in cases of trusts for the benefit of particular persons, the party creating the trust can have no other object than to benefit the persons in whose favour the trust is created; and the trust being well created, the property in equity belongs to the *cestuis que trust*, as much as it would belong to them at law if the legal interest had been transferred to them. But in cases of deeds purporting to be executed for the benefit of creditors, and to which no creditor is a party, the motive of the party executing the deed may have been either to benefit his creditors or to promote his own convenience; and the court, therefore, has to examine into the circumstances, for the purpose of ascertaining what was the true purpose of the deed. And this examination does not stop with the deed itself, but must be carried on to what has subsequently occurred, because the party who

has created the trust may, by his own conduct, or by the obligations which he has permitted his trustees to contract, have created an equity against himself. Each case of the latter description being thus governed by its circumstances, any further examination of the authorities would, I think, be useless. It would lead to the ascertainment of no principle, and would only involve the question whether the principle has been rightly applied." Though we have already exceeded our limits, yet, in connection with the important doctrine of the above cases, we must observe that where a deed creates a trust for the benefit of the party's creditors, but appends a condition to be observed by each creditor prior to his becoming entitled to the benefits of the trust, such condition must be observed. At least this is so where the trustees of the deed have a discretion as to allowing debts, for no creditor can become a cestui que trust except through the exercise of the discretion vested in the trustees. Where the discretion is personal to the trustees, a court of equity cannot take it away from them and transfer it, on a suit to carry out the trusts in favour of all creditors generally, to a Master (see *Cafe v. Bent*, 3 Hare, 245; *Walker v. Walker*, 5 Madd. 424). In the case of *Drever v. Mawdesley* (16 Simons, 511; S. C. 13 Jur. 330; 18 Law Journ. N.S. Chanc. 273) it appeared that A. being greatly in debt, he and his father, in pursuance of an arrangement between themselves, conveyed estates, of which they were seised for life, and in remainder respectively, to trustees in trust for payment of A.'s debts; but no creditor was to be entitled to the benefit of the trust unless the trustees, after having investigated and allowed his debt, should give him a debenture for it. The trustees gave debentures to three of the creditors, after which one of the trustees instituted a suit against his co-trustees, &c., on the hearing of which the Master was directed to take an account of all A.'s debts due at the date of the conveyance, and to advertise for his creditors to prove their debts by a day to be named, or be excluded from the benefit of the decree. The plaintiff and several others, creditors of A., proved their debts under the decree; but, nevertheless, the court, on the hearing for further directions, held that none of them, except the plaintiff (who stood in the situation of a trustee with the fund in his hands, out of which his debt ought to come), and the debenture creditors, were entitled to the benefit of the trust. The Vice-Chancellor of England said that the deeds by the father and son were revocable, for the transaction was nothing more than a settlement of property, in a manner agreeable to themselves, and for their own purposes. And the very essence of the trust-deed was that a creditor, in order to entitle himself to the benefit of the trusts declared by it, should submit, to the uncontrolled judgment and discretion of the trustees, not only the amount of his debt, but all

the circumstances which attended it; and also that the trustees, should take into consideration not merely what appertained to the creditor in respect of his debt, but also what was the probable situation of the son, in the event of the trustees not making an arrangement satisfactory to the creditors; because the personal liberation of the son was a main object both of the father and himself; and it seems to me it was a trust which a court of equity could not execute."

LEGACIES.—*Gift to a class of persons—No intestacy by death of one*—*Gift to present born children*—[*Leigh v. Leigh*, 18 Jur. 115].—Where there is a gift in a will to a class of persons, a question often arises whether, on the death of one of the class prior to the testator, his share goes to the survivors, or whether there is not an intestacy as to that share, or it falls into the residue, and passes under the residuary gift (if any). In the case of *Martin v. Wilson* (3 Bro. C.C. 324) it was held that where the gift was to children of the testator's cousin, share and share alike, at their ages of twenty-one, the share of one dying lapsed, and there was an intestacy as to that share. But this case has not been followed, and in the case of *Viner v. Francis* (2 Bro. C.C. 658) it was held that a gift by will to "the children" of a deceased sister was a gift to them as a class, and that those who were living at the death of the testator would take the whole subject-matter of the gift. This case was followed in the above case of *Leigh v. Leigh*, where it appeared that a testatrix bequeathed a portion of her residuary estate to her brother, H. Leigh, for life, with remainder to his "present born children," their executors and administrators, share and share alike. At the date of the will H. Leigh had four children, one of whom (Barnabas Leigh) died before the testatrix. The Master of the Rolls held, in accordance with *Viner v. Francis*, that this being a gift to a class and not to specified individuals, the three surviving children were entitled to the whole fund. His Honour said, "It is quite settled now that where a legacy is given to a *class* of persons, the class is to be ascertained at the *period of distribution*; and the only question in this case is, whether this is a gift to a class or to specified individuals. If the case of *Martin v. Wilson* (3 Bro. C. C. 324) is to govern this case, I must decide that there is an intestacy as to the share of Barnabas; but that case is opposed to the case of *Viner v. Francis* (2 Bro. C. C. 658), which has always been followed, and has been considered a governing case in this court; while *Martin v. Wilson* would not, I apprehend, be followed, were the same case to arise again. This is a gift to the children of the testatrix's brother, Henry Leigh. It is true that she uses the words 'to all the present born children,' but this is merely a description of a *class*, as if she had said, 'to all the male children,' or to 'all

the female children." That would be a limitation of the class, and all who answered to that description at the time of payment would be entitled. The fact that the class is liable to fluctuation by diminution only, and not by increase, does not affect the case. The children, therefore, who survived the testatrix, and who were 'the present born children' of Henry Leigh at the time of the gift taking place, are entitled to the whole legacy, there being *no intestacy*. The case of *Bain v. Lescher* (11 Sim. 397), and other cases, are distinguishable, because there the gift was not to a class, but to *specified individuals*; and in such cases, if one of the legatees dies, his share falls into the residue, or goes to the next of kin. I must make a declaration that the plaintiffs, the three surviving children, are entitled to the whole fund." *Leigh v. Leigh*, 18 Jur. 115.

BILL OF EXCHANGE.—*Acceptance in blank*—*Authority to fill up*—*Revocation by death*—*Bond fides and consideration*—[*Hatch v. Searles*, 22 Law Tim. Rep. 280].—In the case of *Russell v. Longstaffe* (Dougl. 496) Lord Mansfield held that the indorsement of a blank note is a letter of credit for an indefinite sum. Subsequent authorities have qualified this by holding the amount to be defined by the limits of the stamp. In *Montague v. Perkins* (21 Law Journ. N.S. C.P. 187; S.C. 17 Jur. 557) it was held that a person, by giving another a blank acceptance, makes him, as to third parties, his general agent to fill up the bill to the extent the stamp will cover, and he is bound by his acceptance in the hands of an innocent holder for value, and that therefore to an action by an indorsee *for value without notice* against the acceptor, it is no defence that the acceptance was given in blank to the drawer, and that the bill was not filled up and issued until twelve years afterwards. And further, that the statute of limitations runs from the time the bill became due as filled up, and not from the time it would have become due if completed when it was accepted in blank. Jervis, C. J., in this case stated the law to be, "that the giving a blank acceptance is evidence of an authority to the party to whom it is given to fill up the bill for the amount, and it may be for the term to which the stamp extends" (See also *Temple v. Pullen*, 8 Excheq. Rep. 389; S.C. 22 Law Journ. N.S. Exch. 151). The above rule, viz., that the giving of a blank acceptance is evidence of authority to the person to whom it is given to fill up the bill to any amount, was recognised by V. C. Stuart in the above case of *Hatch v. Searles*, but he also qualified it by holding that it applies only to *bond fide* holders for valuable consideration without notice, which, indeed, seems to have been the ruling of the Court of Exchequer. His Honour therefore held, where it appeared that A. gave B. two acceptances in blank, upon stamped paper, and afterwards died, and B. filled up the bills after the acceptor's death (with a misrepresenta-

tion as to the testator's residence), and indorsed them over, the holder of one of the bills being present at such filling up, and the other being aware of the original transaction, that the authority given to B. was revoked by A.'s death, and the claims of the holders of the bills against A.'s estate were disallowed. His Honour, in his judgment, after referring to the above proposition of C. J. Jervis, said, "The proposition is stated in similar terms in many of the cases; but it is always so stated with reference to *bond fide* holders for valuable consideration. The general terms in which the proposition is stated must be read with reference to the facts of the cases to which it was applied. As an absolute general principle it cannot be maintained; and although, in the passages quoted in the case of *Montague v. Perkins* from the judgment of Jervis, C. J., it is stated in general terms, and sounding as an absolute rule, yet the subsequent passages in the same judgment introduce proper qualifications, and say that giving a blank acceptance is only *prima facie* evidence of authority to fill up, and, being only *prima facie* evidence, may of course be rebutted by evidence of the real nature and extent of the authority and of the true terms of the contract, and of the whole transaction between the person who signs in blank and the person to whom the blank acceptance is given. Therefore the general proposition relied on by counsel in the case now before me does not absolutely govern when the question is between the acceptor in blank and the person who receives it in blank from him. If the transaction between them is not supported by any valuable consideration, independently of any other evidence of a contract between these two persons, the blank acceptance is an imperfect instrument, which in itself could create no contract; although *prima facie*, but only *prima facie*, it might imply some authority to one of the parties. As to a *bond fide* holder, the question as to the effect of the acceptance or indorsement having been written on a blank piece of paper can be of no importance, unless he is fastened with notice of that imperfection. If the holder has no notice of the imperfection, he can be in no better situation than the person who took it in blank as to any right against the acceptor or indorsee who gave it in blank. But if he be a *bona fide* holder without notice—as he must have taken the negotiable instrument in a perfect shape, and in terms a complete contract, without any notice or circumstance of suspicion to call for inquiry, which would be equivalent to notice—the law in favour of the rights of a *bond fide* holder of the negotiable instrument apparently perfect as a contract, will not permit the acceptor to annul the effect of his own act upon evidence of a transaction to which the holder was not privy, and which may contradict the terms of the written contract to which the *bona fide* holder was justified in given credit."

LARCENY.—*Difference between embezzlement and larceny*—[*Reg. v. Reed*, 18 Jur. 66.]—The examiners are continually putting questions as to the distinction between embezzlement and larceny; and though we have elsewhere (see Key, div. "Criminal Law," pp. 37, 39, 41) endeavoured to point out the difference, yet we think our readers will do well to study the above case of *Reg. v. Reed*. That the point there taken was one of difficult determination, may be concluded from the facts that there were two arguments, and that on the first the judges differed in opinion. Our readers may perhaps wonder how the point arose, since the statute of 14 and 15 Vict. c. 100, s. 13, allows a verdict for either larceny or embezzlement on an indictment for either offence. But in this case the prisoner had been indicted for larceny, and was convicted of that offence. The facts were these: the prisoner was sent with his master's cart for some coals. The coals were delivered to the person, and deposited in the cart, their price being entered to the master's account. On the road home the prisoner disposed of a portion of the coals. The prisoner having been indicted for, and convicted of, larceny, it was held by the Court of Criminal Appeal, that this was larceny of the coals, and not embezzlement, the prisoner having determined his exclusive possession of the coals when they were deposited in the cart, and the possession from that time being in the master (*Reg. v. Reed*, 18 Jurist, 66, 67). In delivering judgment Lord Campbell said: "I am of opinion that the prisoner has been properly convicted of larceny. There can be no doubt that in such a case the goods must have been in the actual or constructive possession of the master; and that if the master had no otherwise the possession of them than by the bare receipt of his servant upon the delivery of another for the master's use, although as against third persons this is in law a receipt of the goods by the master, yet in respect of the servant himself this will not support a charge of larceny, because as to him there was no tortious taking in the first instance, and consequently no trespass. Therefore, if there had been here a quantity of coals delivered to the prisoner for the prosecutor, and the prisoner, having remained in the personal possession of them, as by carrying them on his back in a bag, without anything having been done to determine his original exclusive possession, had converted them *animo furandi*, he would have been guilty of embezzlement, and not of larceny. But if the servant has done anything which determines his original exclusive possession of the goods, so that the master thereby comes constructively into possession, and the servant afterwards converts them *animo furandi*, he is guilty of larceny, and not merely of a breach of trust at common law, or of embezzlement under the statute. On this supposition he subsequently takes the goods tortiously in converting them, and commits a trespass. We

have, therefore, to consider whether the exclusive possession of the coals continued with the prisoner down to the time of the conversion. I am of opinion that this exclusive possession was determined when the coals were deposited in the prosecutor's cart, in the same manner as if they had been deposited in the prosecutor's cellar, of which the prisoner had the charge. The prosecutor was undoubtedly in possession of the cart at the time when the coals were deposited in it, and if the prisoner had carried off the cart *animo furandi*, he would have been guilty of larceny (Robinson's case, 2 East, P.C. 565). There seems considerable difficulty in contending, that if the master was not in possession of the cart, he was not in possession of the coals which it contained, the coals being his property, and deposited there by his orders, for his use. Mr. Ribton argued that the goods received by a servant for his master remain in the exclusive possession of the servant till they have reached their ultimate destination; but he was unable, notwithstanding his learning and ingenuity, to give any definition of "ultimate destination," when so used. He admitted that the master's constructive possession would begin before the coals were deposited in the cellar, when the cart containing the coals had stopped at his door, and even when it had entered his gate. But I consider the point of time to be regarded is that when the coals were deposited in the cart. Thenceforth the prisoner had only the custody or charge of the coals, as a butler has of his master's plate, or a groom has of his master's horse. To this conclusion I should have come upon principle; and I think that Spears's case (2 East, P.C. 568) is an express authority to support it. The following is an exact copy of the statement of that case, signed by Buller, J., in 2 Black Book, 182, 183, containing the decisions of the judges in Crown cases, and deposited with the Chief Justice of the Queen's Bench for the time being:—

" 'John Spears was convicted before me, at Kingston, for stealing forty bushels of oats of James Browne and Co., in a barge on the Thames. Browne and Co. sent the prisoner with their barge to Wilson, a corn meter, for as much oats as the barge would carry, and which were to be brought in loose bulk. The prisoner received from Wilson 220 quarters in loose bulk, and five quarters in sacks, the prisoner ordering that quantity to be put into sacks. The quantity in the sacks was afterwards embezzled by the prisoner; and the question reserved for the opinion of the judges is, whether this was felony, the oats never having been in the possession of the prosecutor, or whether it was not like the case of a servant receiving change or buying a thing for his master, but never delivering it.

" 'Vide Dy. 5, and 1 Show. 52.

" 'F. BULLER.

" '25th April, 1798.

" 'Conviction proper.'

In that case the question arose, whether the corn, while in the prosecutor's barge, in which it was to be brought by the prisoner to the prosecutor's granary, was to be considered in the possession of the prosecutor; and the judges unanimously held, that from the time of its being put into the barge it was in the prosecutor's possession, although the prisoner had the custody or charge of it. That case has been met at the bar by a suggestion, that the whole cargo of corn, of which the quantity put on board this barge was a part, was or might have been purchased by the prosecutor, so that he might have had a title and constructive possession before the delivery to the prisoner. But the very statement of the case in the Black Book, and the authorities there referred to, show that the judges turned their attention to the question, whether the exclusive possession of the servant had not been determined before conversion; and during the argument of *Rex v. Walsh* (4 Taunt. 258), we have the *ratio decidendi* in *Spears's* case explicitly stated by one of the judges, who concurred in the decision—'Heath, J.—That case went upon the ground that the corn was in the prosecutor's barge, which was the same thing as if it had been in his granary.' Read 'cart' for 'barge,' 'coals' for 'corn,' and 'cellar' for 'granary,' and the two cases are, for this purpose, precisely the same. There is no conflicting authority, for in all the cases relied upon by Mr. Ribton the exclusive personal possession of the prisoner had continued down to the wrongful conversion."

MOOT POINT.

No. 39. *Dower—Reconveyance.*

A conveys an estate in fee simple to B. (who was married to his wife before 1834) and C. as his trustee to bar dower. B. and C. mortgage in fee to E., who subsequently reconveys unto and to the use of B., his heirs and assigns. Will the right of B.'s widow to dower gain attach, viz., on the reconveyance? The mooter conceives that it will not, but he has no authority for his conclusion. B.'s title might afterwards be commenced with the reconveyance, and if it did not appear on the face of the abstract that the dower was barred, it is apprehended that this might be a ground of objection with the purchaser. The mooter will feel obliged if any gentleman will correspond privately with him upon the subject at the earliest possible convenience (as it is a point on which he wishes to be satisfied forthwith) accompanied with any authorities bearing thereon.

HENRY REDDISH (Stockport).

LITTLETON'S TENURES.

We have the satisfaction to announce that the first Volume of the "LAW STUDENTS' LIBRARY" is completed. We are not, indeed, certain whether it will be in the hands of the subscribers at the time this is read; but if not, many days cannot elapse before it is received, as the whole work has certainly been printed, and is at this time being stitched and prepared for transmission.

We think our readers will be pleased with this first specimen of the LIBRARY, though it is not a work which will show so readily the advantages of our plan as some of the others will do. For it must be borne in mind that it was not so much the object of Littleton to make a display of abstract propositions as to instruct by way of example, i.e., putting cases, either actual or supposed, adding, however, on every fitting opportunity, some general rule or principle of law by way of explanation of the particular case. It is this quality of Littleton which has given such a value to his work, not only to the student but also to the practitioner, and whilst the law remained unchanged, rendered it a *vade mecum* to the real property lawyer. With these changes some of the cases put by Littleton have necessarily lost their value, because no longer applicable to the transactions of to-day, and there is nothing historical or abstract to fall back upon. This has necessitated the omission of very many of the sections, having, however, a very useful *residuum* which the practitioner and the student alike may peruse with profit. For it must be borne in mind that the works we have selected are not such as a student can throw aside when he has passed his studentship, but rather he will find their real utility in actual practice, when a frequent re-perusal will keep the principles and most important general propositions of the law in his mind. If this was thought necessary in former days, when there were few reports, it is still more necessary at this time, when the multitude of regular and irregular reports makes it so difficult for the practitioner to get at the principles of the law. The greater portion of the reported cases are the mere statement of facts, squared with former decisions, rather than the application of principles. Of Littleton, as now presented to the profession, might be repeated what Roger North says (Study of the Law, p. 11, as quoted 2 Mag. O.S. p. 2), "However fitted this book is to the capacity of a beginner, the very adepts in the law are not frequently ashamed to read it. *I knew a Lord Keeper that used to read it every Christmas as long as he lived.*"

which is so authentic." The editor of the last edition of North's work adds, very justly, "Littleton's text has become a first-rate authority, and the student who wishes to build his knowledge upon a sure foundation cannot do better than make himself thoroughly acquainted with Littleton."

We have to observe that we have given explanatory notes as often as we thought it necessary, in which, however, we have chiefly confined ourselves to pointing out the recent statutory enactments and their effect on Littleton's text. Wherever the text is partially affected by the new statutes, we have indicated the change by such words as "*formerly*," "*in Littleton's time*," &c., so that the student may, between the text and the note, have his attention called prominently to the actual law. However, the chief and most important novelty of the present edition consists in the "QUESTIONS" both on the text and notes. To us this has been a great labour, though one not unattended with benefit, which has served in some degree to reconcile us to the exertion. We had an expectation before commencing, that this feature of the work would prove useful, but not to so great an extent as, having completed one work, we perceive it must be. Our readers are aware that one or two works have been furnished with Questions, among these the best known is Stephen's Commentaries. But any one who has used them must be aware how defective they are, inasmuch as they do not embrace every proposition in the work, but seek by a general question to cover, very frequently, several pages. Having adopted the plan of Questions, we have boldly followed it out to its legitimate extent; and we may say that there is not a proposition, however short, in the work which has not its appropriate question. Indeed, in some instances the question occupies as much space as the text itself. The extent to which the questions have proceeded, as a general rule, will be best apprehended when we state that they occupy nearly one-third of the text and notes. In fact, whenever the reader shall have answered all the questions, he will have gone over every portion of the text and notes, not merely in the gross but in detail, for it is seldom that a question relates to more than two or three lines of text. In addition to this, we have occasionally added, in italics *suggestive* questions arising out of the previous questions, or from the text and notes, though not there stated, or, at least, only inferentially, which will serve to keep the reader attentive, and preserve him from falling into a mechanical habit of reliance on the text.

On the whole we feel that this work will be a worthy commencement of as good a plan as could possibly be devised for ensuring the certain progress of the student, and we shall certainly persevere with and most probably extend it far beyond what we at first contemplated. Of course, we are assuming that the works will be supported by our

subscribers and others, both students and practitioners, as, otherwise, however useful we might think them to be, we should not continue them. We now present an extract from the "Questions" on Littleton, to enable our readers to judge for themselves of the mode in which they have been framed, and the probability of their being useful.

[NOTE.—The portions in brackets, immediately following the different titles, are by way of *index to the work*. The portions in *italic*, among the questions, are *additions*, and are left for the most part to be answered by the reader for himself. They are suggested by the other questions of the text, and are intended to be *suggestive*, and should be considered by the reader.]

FREE SIMPLE [pp. 1—6].

["Heirs" in conveyances (p. 1)—Descents—Collaterals and lineal ancestors (p. 2)—Paternal and maternal line (p. 3)—Half-blood (p. 4)—Possessio fratris (pp. 5, 6)—Purchase (p. 6)].

I. [p. 1].—Define an estate in fee simple. What words in conveyances are necessary in order to give a fee? On a grant to A. "to hold to him and his assigns for ever," what estate passes? What estate does the word "fee," when used alone, signify? Does the rule which applies to conveyances respecting the limitation of a fee apply to wills? On a devise to "A.," what estate will he take? (*Did this rule apply to wills before the late Wills' Act?*)

II. [p. 2].—If an owner in fee of land die, leaving no issue or father, who will take the land? Will it make any difference whether the deceased purchased or inherited the land? Is it seisin that makes a man the stock or root of descent? From whom is a descent to be traced? Is there any and what mode by which a person who has inherited land can make himself the root of descent? (*see also note to sect. 12.*)

III. [pp. 2, 3].—Did inheritances formerly ascend to the lineal ancestor? If an owner of land dies without issue, leaving a brother and a father, who will be his heir? Will it make any difference whether the owner acquired the land by purchase or by descent?

IV. [p. 3].—An owner of land dies without issue or father, will the heirs *ex parte paterna* or *materna* inherit? Will it make any difference whether the owner acquired the land by purchase or by descent? If he inherited the lands through his mother, can the heirs *ex parte paterna* inherit? If through his father, can the heirs *ex parte materna* inherit? Can a person who takes by descent constitute himself the root of descent by any and what limitation in a deed? Can a maternal inheritance be turned to a paternal one in such a way? (*or vice versa, see Com. Dig. tit. Estates, A.,*

citing Co. Litt. 13a.) On a limitation to the heirs or heirs of the body of a person taking no estate, how does the land descend? If the person be a woman, and her only child enters and dies without issue, will the heirs *ex parte paterno* or *materno* inherit? State how this was formerly, and what has caused the difference (*see also note to sect. 12, and endeavour to understand the matter*).

V. [p. 4.]—There are three brothers: the middle one is owner of land; he dies without issue, leaving a father, who is his heir? and who if he had left no father? Suppose the youngest brother died, would there be any difference? Is there any custom which might affect either or both of these cases? How was the descent between brothers formerly traced, and how is it now?

VI. [pp. 4, 5.]—Could relations by the half-blood formerly inherit to each other? Did the rule apply to all kinds of inheritances? Can half-blood now inherit, and, if so, is it in a limited or an unlimited manner? There are two brothers by different *mothers*; one purchases lands, and dies without father or issue, but leaving sisters and other collateral relations; will they all take before the half-brother? Suppose the two brothers are by different *fathers*, and that the brother leaves only uncles, &c., on his father's side, will the half-brother or the uncle be the heir?

VII. [p. 5.]—Is the half-blood now excluded altogether, or merely postponed?

VIII. [p. 5.]—In a case prior to the New Inheritance Act, on the death of an owner of land, his son did not obtain seisin; he died, leaving a sister of the whole blood and a brother of the half-blood; who was his heir? Suppose he did obtain seisin, what was the difference, and what at this time? Could a party taking by descent make himself the root of descent in any and what manner? Can he now do so? Was and is there any and what maxim relating to seisin constituting a root of descent? Was seisin equivalent for all purposes of descent to a purchase? (*note to sect. 12.*) There are two half-brothers; their father purchases lands, and dies; one brother obtains seisin, and dies without issue, but leaving a sister; who is his heir? Could the brother who was seised by any and what means prevent the half-brother from inheriting previously to his sister? (*see notes to sects. 4, 12.*)

IX. [p. 6.]—How is the word "inheritance" applied? Is an estate tail an inheritance? Is it a *particular* estate? What proves that it is so, or not so? (*See also, notes to sects. 13, 18, 19.*)

XII. [p. 6.]—What is an estate by purchase? Can a person who inherited an estate make himself a purchaser thereof, by limiting an estate to himself or his heirs in a conveyance? Could he do this formerly? Did the obtaining seisin under the old law turn an inheritance which was *ex parte materno* into one *ex parte paterno*?

ESTATE TAIL [pp. 7—11].

[General and special tail (p. 7). Heirs male and female in gifts in tail (pp. 8, 9). Gifts to husband and wife and their issue (p. 10). Gift to A. and his heirs male or female (p. 10)].

XIII. [p. 7.]—What statute gave rise to estates tail? What were estates before that statute? What kinds of estates tail are there? What must be the subject-matter, and what the estate to make an entail? Can an estate for another's life be entailed? Can copyholds be entailed in general? Is an estate tail a particular estate?

XIV. [p. 7.]—What is an estate in tail general? Why is it called tail general? Tenant in tail general has children by two wives; can they all inherit the estate? What words are necessary to be used in creating an estate tail? On a gift to A. and the heirs of his body, what estate does he take?

XV. [p. 7.]—On a gift to a woman and the heirs of her body, what estate does she take? If she marry a second husband, will her children by both marriages be entitled to inherit?

XVI. [p. 7.]—What is an estate in special tail? On a gift to a man and his wife and the heirs of their two bodies, if the wife die and the husband marry again, will the issue of the second marriage be able to take? Is it necessary in a gift in special tail that the two donees should both take estates?

XVII. [p. 8.]—What was the estate in frankmarriage?

XVIII. and XIX. [p. 8.]—Where the donee or donees in tail die without issue, what is the result? Is an estate tail a particular estate, and how do you show this to be the case?

XXI. [p. 8.]—On a gift to A. and his heirs male of his body, what estate is taken, and can female issue inherit?

XXII. [p. 8.]—On a gift to A. and his heirs female of his body, what estate is taken, and can male issue inherit?

XXIII. [p. 8.]—On a gift to a man and the heirs male of his body, must the descent be traced entirely through males? (*See also sect. 24 and note.*) If the donee have issue two sons, and the eldest son inherits and dies, leaving a daughter only, can she inherit? Do issue in tail take by descent merely?

XXIV [p. 9.]—Gift to a man and the heirs male of his body; he dies, leaving only a grandson by the deceased daughter, can a grandson inherit; if not, for what reason? Can the donor re-enter in the lifetime of such grandson? Did the rule of Littleton apply in the case of a gift to the heirs male of the body of A., without A.'s taking any estate? (*Was the issue taking under such a limitation a purchaser? Was the descent traced from him, and is it so now? And see note to sect. 4.*) On a limitation to the heirs male of the

body of A. as purchasers (prior to the Inheritance Act), would the grandson in the above case take? Would he take if the limitation were since that statute? (*And see note to sect. 4*). Have the courts shown an inclination to prefer a male claiming entirely through males, to a male who is heir-general, but claims through females, in any and what cases of limitations to heirs male of the body?

XXVI. [p. 10.]—What estates pass on a conveyance to A. and his wife, and the heirs of the body of A. Does the wife take any and what estates?

XXVII. [p. 10.]—What estates pass on a gift to A. and his wife, and to the heirs of A., which he shall beget on the body of his wife?

XVIII. [p. 10.]—On a gift to A. and his wife, and to the heirs of the body of the wife, by A. begotten, what estates have A. and his wife respectively? On a gift to A. and his wife, and to the heirs which A. shall beget on the body of the wife, what estates have A. and his wife respectively, and why?

XXIX. [p. 10.]—Gift to A. and his heirs which he shall beget on the body of his wife, hath the wife any and what estate?

XXXI. [p. 10.]—Conveyance to A. and his heirs male or heirs female, what estate passes? What in the case of a will? By what words may an estate tail be created in a will? Is there any difference in this respect between a deed and a will?

TENANT IN TAIL AFTER POSSIBILITY OF ISSUE EXTINGUISHED [p. 11.]

[Definition—Special Tail—Only Donees.]

XXXII. [p. 11.]—Upon what gift does a tenancy in tail after possibility of issue extinct arise? Are the donees in special tail called tenants in tail after possibility, &c., after the death of one of them; if so, under what circumstances? Is the survivor called tenant in tail after, &c., during the existence of issue?

XXXIII. [p. 11.]—Gift to A. and his heirs begotten on the body of his then wife; is this general or special tail? Are husband and wife both donees, and what estates do they take? Where the husband alone takes an estate, does an estate after possibility, &c., ever and when arise?

XXXIV. [p. 11.]—Who is said to be tenant in tail after possibility, &c.? Is tenant in tail general ever so called? Are the issue in special ever so called? Can there be a tenancy in tail, &c., of a remainder?

ARTICLED CLERKS AND THE EXAMINATIONS.

As our readers are pretty well aware, there has for some time past been a movement in operation with a view to exclude, as far as

possible, from the profession uneducated persons. This has been greatly pushed forward in consequence of the reduction made by the Chancellor of the Exchequer in the stamp duty on articles of clerkship, the effect of which would be, it was apprehended, to attract a larger number of persons and of a more miscellaneous class than heretofore to the profession. Whether such a reduction will have that effect can only be ascertained by experience; but still, it may be well to prevent any ill effects by taking measures to raise the standard of education of all candidates for admission. There can be little doubt, that a measure which should ensure that articulated clerks should be persons of good general education, would have the effect of raising the character of the profession in the eyes of the public. We are not surprised, therefore, to hear that a scheme of preliminary examination in general learning is in contemplation. In the *Law Times* we find the following statement:—

“It is asserted, with what truth we know not, that the Law Institution, stimulated by the ready assent given by the Benchers of the Inns of Court to the proposed inquiry into the legal education of the bar, has come to the resolution, which we have been so strenuously urging, to extend the examination of articulated clerks from merely legal knowledge to general education. Heartily, indeed do we congratulate the profession on this great reform. We verily believe it will do more to make the lawyers what they ought to be, to maintain the respectability and social status of the profession, and to ward off impending mischiefs, than any measure that has yet been adopted or even devised. The fate of one branch of the profession is in the hands of the council of the Incorporated Law Society, and we thank them on behalf of the profession for this timely concession to the opinion expressed by so many of the provincial law societies, and prevailing almost universally among the solicitors.” We find from the *Legal Observer*, that there are good grounds for saying that some scheme is in agitation, and we have made enquiries from solicitors who are likely to be well informed on the subject, and we are assured that a plan is in course of preparation, but that nothing decisive has yet been done. Indeed, it is difficult to see how anything can at present be effected, for it is certain that the Incorporated Society alone cannot effect any such change, but that at least the Judges and the Master of the Rolls must be consulted, and be convinced of the utility of the plan. And we think it is possible they may not be willing to take on themselves so great an alteration, but will prefer that the legislature should be asked to give the necessary powers, for, undoubtedly, the plan will be in the nature of an obstruction to the free admission of the public to the profession. Besides, to be effective, the examination must be introductory to the articles, and not, as in the ordinary examination, consequent upon the com-

pletion of the service. Now, the 6 & 7 Vict., c. 73, requiring an examination, authorises it only in respect of persons *applying to be admitted as attorneys and solicitors*, and we should think it clear that only *then* could the proposed examination take place. It appears to us, therefore, plain that without an act of Parliament the proposed examination cannot be instituted.

With respect to the point which most materially concerns our readers, namely, whether the proposed examination, if instituted by the examiners and judges, would be applied to clerks now under articles, we should conceive that it is beyond a doubt that such a proceeding would be unjust, and we may, therefore, assume that it is not likely to be adopted. Indeed, the object of such an examination is not to affect those already under articles, but only to prevent or moderate the threatened influx, and the application of the rule to clerks now under articles would hardly have that effect, besides being so obviously unjust as to be calculated to frustrate the really laudable part of the plan.

We are assured, however, that in a short time, when the plans of the committee of the Law Institution are a little more matured, a public announcement will be made of the effect thereof, which will give the profession and the public (who really will be found to be affected by and therefore interested in the plan) an opportunity of expressing their views on the matter. Until then our readers need not be under any great apprehensions; but if it should prove that we are in error, and any great injury should be done to the present body of clerks, it will then be necessary to consider what effectual steps can be taken to obtain a remedy.

DIGEST OF RECENT CASES.

BANKRUPT.—*Summoning trader—Deposing to good defence—Discretion in requiring bond.*—Where a trader debtor is summoned under the 78th section of the Bankrupt Law Consolidation Act, and deposes that upon the merits he has a good defence to the demand of the summoning creditor, the 79th section of the act does not make it imperative upon the court to require a bond with securities, to be given by the trader debtor as security for the demand and costs; but makes it incumbent upon the court to exercise a discretion whether to require such bond or not, having a regard to all the circumstances of the case, therefore, the court refused to require the security of a bond in a case in which it appeared, that but for the demand of the summoning creditor the trader was solvent, and that the demand was in respect of a balance of account between the cre-

ditor and the trader upon several contracts for sale and resale of tallow in which no money or tallow had actually been paid or delivered in specie; but which were carried out by the delivery and redelivery of the same dock warrants for the delivery of tallow, the result being a balance in favour of the creditor arising from the excess of the price of sale by the creditor to the trader over the price of resale by the latter to the creditor (*ex parte* Wood in re Wood, 18 Jur. 229).

POWER OF APPOINTMENT.—*By deed or writing—Execution.*

—Where a party has a power of appointment "by any deed or deeds, writing or writings," under his "hand and seal," it is not a good execution of the power, if the donee makes his will pursuant to the requisition of the 10th sect. of the Wills Act, 7 Will. 4, and 1 Vic. c. 60 (*West v. Ray*, 23 Law Times Rep. 9).

NOTE.—This is another confirmation of the doubt we expressed in 5 Mag. N.S. p. 382, as to a will being a good execution of such a power.

SESSIONS.—*Costs—Order directing costs to be paid.*—The 11. & 12 Vic., c. 43, s. 27, provides that where quarter sessions, upon an appeal against an order, direct either party to pay costs, "such order shall direct such costs to be paid to the clerk of the peace, to be by him paid over to the party entitled;" it was held that a mistake in ordering costs to be paid directly to the party to the appeal, instead of the clerk of the peace, was not a defect of jurisdiction but merely erroneous procedure; and, therefore, where such an order had been made under an act taking away the *certiorari*, the court refused to set it aside when brought before them by *certiorari* (*Reg. v. Binney*, 1 El. and Bl. 810; S.C. 17 Jur. 854; 22 Law Journ. N.S., M.C., 127).

SHERIFF.—*Executing process—Continuing an unnecessary time in possession under a fieri facias.*—A sheriff who has entered under a *feri facias*, and continues on the premises in possession of the goods for more than a reasonable time, is liable in trespass for so continuing beyond the time allowed by law (*Ash v. Dawson*, 8 Exch. Rep. 287; S.C. 22 Law Journ. N.S. Exch. Rep. 59).

SHIPPING.—*Contract for sale—Reciting certificate of registry—Non-registration of contract—Notice of unregistered contract.*—The 34th sect. of the Ship Registry Act, 8 & 9 Vic. c. 89, includes an executory contract for the sale and transfer of a ship, and an action for the breach of such a contract in not accepting the transfer and paying for the ship, cannot, therefore, be maintained, unless the contract be by an instrument in writing, reciting the certificate of registry (*Duncan v. Tindall*, 17 Jur. 347; S.C. 22 Law Journ. N.S. C. P. 137). An unregistered contract for the sale of shares in a British vessel cannot be enforced in equity (*Hughes v. Morris*,

2 De Gex, Mac., and G. 349; S.C. 16 Jur. 603; 21 Law Journ. Chanc. 761). The provisions of the Ship Registry Acts apply equally to contracts as to sales; and the whole frame of these acts negative any equity resulting out of the doctrine of notice. An unregistered agreement, therefore, with the registered owner of a ship, which the owner subsequently transfers for value to another person, who has notice of the agreement, cannot be enforced either as against the ship or its proceeds (*M'Calmont v. Rankin*, 2 De Gex, Mac., and G. 403; S.C. 22 Law Journ. N.S. Chanc. 554).

INSOLVENT DEBTORS.—*Judgment, satisfaction—Interest on debts—Jurisdiction*, 1 & 2 Vict. c. 110, ss. 87, 92.—Where judgment has been entered up against an insolvent debtor in pursuance of s. 87 of stat. 1 & 2 Vict. c. 110, this court has no jurisdiction to order satisfaction to be entered on such judgment, upon the ground that all the debts in respect of which the adjudication was made have been paid. The power to make such an order is reserved, under s. 92, to the Insolvent Debtors Court: so held where the commissioners of that court differed in opinion whether payment of debts without interest entitled the party to have satisfaction entered (re *Sturgis v. Joy*, 18 Jur. 241).

MORTGAGE.—*Of wife's estate—Estates in settlement—Limited effect of the mortgage.*—If a husband and wife concur in mortgaging the wife's estate, or an estate in which she has any interest, whether it be a right of dower or an interest in remainder, or otherwise, *prima facie* in the absence of evidence of intention to the contrary, the wife will be considered as having joined merely to secure the mortgage, and the terms in which the equity of redemption is limited will not affect her right. When, by the execution of a power, a mortgage is effected of estates in settlement, *prima facie* the intention is merely to convert an unincumbered into an incumbered estate; and it is not from slight expressions that any contrary intention will be inferred (*Whitbread v. Smith*, 23 Law Tim. Rep. 2).

WILL.—*Jurisdiction of equity over gifts in after probate.*—Where probate is granted establishing the validity of a testamentary instrument, courts of equity have jurisdiction to inquire into the validity of gifts challenged, on the ground of fraud and undue influence (*Hudson v. Weatherell*, 18 Jur. 233).

DOWER—ELECTION.

We have already (*ante*, pp. 121, 122) given a short notice of the decision of V.C. Kindersley in *Parker v. Sowerby* (17 Jur. 752;

S.C. 1 Drewry, 488; 22 Law Journ. N.S. Chanc. 942) on the question of putting a widow to her election, where there is a gift in her favour in the will, between that gift and her right to dower, and we have noticed that the learned judge laid great stress on the fact that the estate was devised to trustees with a *power to lease*, which he considered to be indicative of an intention on the part of the testator to deprive the widow of those rights which in the absence of such a power she would be entitled to claim. We have now to call attention to another decision by a different judge (the V.C. Stuart), where the various cases are reviewed and a different conclusion arrived at, though, as will be presently seen, some reliance was placed on the smallness of the gift, which was an annuity, and that another person had a larger gift by the same will, though a stranger to the testator. The decision was in effect as follows:—Where a widow is entitled to dower, and the husband has made a provision for her by will, and by the same will has given the trustees a *power of leasing*, the mere circumstance of that power having been given is not sufficient to raise the necessary implication that he intended the provision to be in satisfaction of her right to dower. Therefore, in a case where the provision for the widow was an annuity much smaller than the value of the dower, and a smaller annuity had been given by the same will to a stranger, it was held that there was no intention apparent that the widow should not have both, and ordered accordingly that she was entitled to both (*Warbuton v. Warbuton*, 22 Law Times Rep. 328). His Honour, V.C. Stuart, in his judgment, said:—“In this case I am bound to decide on the question of the wife’s right to dower according to my notion of the law as settled by all the authorities; and I do not think there is any doubt about the law at all. I understand the law to be, that if a widow entitled to dower out of her husband’s land, has, by his will, a provision made for her, without any statement that such provision was made in lieu of dower, she was entitled both to her dower and to the provision under the will, unless upon the whole will a necessary implication arises that the gift under the will was in substitution of her right to dower. That I conceive to be the principle of law in all these cases; but the application of that principle is often of great difficulty. The difficulty consists in this, as to what the minds of particular judges may hold to be a necessary implication arising from the language of the will. I am told, in this case, that if I hold the widow to be entitled to her dower and to the provision under the will, I shall unsettle the whole law on the subject, and overrule the authorities. I intend to do neither the one nor the other. I will endeavour to state why I consider it impossible to hold that this widow is to be put to her election. The authorities pressed against the widow’s right to both these provisions are the decisions of Lord St. Leonards, in *Hall v.*

Hill (1 Dru. and Warr.), of V.C. Knight Bruce in *Grayson v. Deakin* (3 De Gex. and Sm. 298), and of V.C. Kindersley, in *Parker v. Sowerby*. The decisions of Vice-Chancellors Knight Bruce and Kindersley go strongly to support the proposition, that in this case the widow is put to her election, and is not entitled to both provisions. I think that both those cases proceeded on a misapprehension of Lord St. Leonards' decision in *Hall v. Hill*; and I am perfectly certain, from the language of Lord St. Leonards in *Hall v. Hill*, that he did not decide any such proposition as that conceived by the two Vice-Chancellors. The proposition is reduced to this, whether, if the widow be entitled to dower, and the husband by his will makes for her a provision, and thereby gives to trustees a power of leasing over all his lands, does the mere circumstance of that leasing power raise more than a necessary implication that he intended such a provision made by his will should be a satisfaction of her right to dower? Lord St. Leonards carefully stated that he intended to decide no such proposition. The case of *Hall v. Hill* certainly did not make it necessary for him to decide any such proposition. For although in cases of this kind the insertion of a power is a strong circumstance, yet it is not enough to raise a necessary implication. Lord St. Leonards, in *Hall v. Hill*, had not to deal with the case of a provision made for the widow by the will, and there was nothing to show that she should not be put to her election. There were other strong circumstances in that case. For, in the first place, as noticed in the judgment upon it, there were the circumstances that he made an ample provision for the widow; that he gave a portion of an estate for her life; that he gave her an annuity charged upon his general estate, with powers of distress and entry. In addition to these circumstances, there was a power of leasing to trustees, and a power of leasing over *all* his estates. Now Lord St. Leonards, noticing these circumstances, which seem to me to be of the highest importance, certainly does notice the power of leasing. He says, moreover, that he was not aware how the power of leasing in that case could be exercised over all the estates, if the right to dower was allowed. But he said the power of leasing in that case was given for a particular reason. If she had been entitled to both provisions, the effect of the power of leasing would be to derange the whole course of the provisions given by the testator's will. What Lord St. Leonards decided that case upon was this: that she has acquired under the will a much greater provision than she was entitled to as dower in the ordinary way; and it was held, therefore, that she was barred of dower by a clear implication. I have satisfied myself of the intentions of the testator, and of the law upon the amplitude of provisions, and I think that it was clearly the intention of the testator that she should not have both. I cannot hold that a mere insertion of a power of leasing is

enough to raise a necessary implication. I therefore consider that anything which has been said in any subsequent case which attributes to Lord St. Leonards, in *Hall v. Hill*, that his judgment proceeded principally, if not entirely, on a power of leasing, is to misconceive what, to my mind, Lord St. Leonards very clearly expressed in that judgment. The principle being clear, and I being bound to look at the whole will, to see whether I can find what shall satisfy me that the intention of the testator was that she should not have both provisions—when I look at this will, I am satisfied that he had no such intention. If I find that the whole provision made for the widow is an annuity of £20—if I find, also, that for a stranger a provision is made of exactly the same amount—there is so far from being here the fact of that great and governing circumstance that weighed with Lord St. Leonards, that this, when compared with the amount of dower, instead of being an ample provision, is such a one as that, if put to her election, she would elect to take her dower. In Lord St. Leonards' case, the amplitude of the provision left no doubt as to what would have been the widow's choice; here it is a matter of certainty that she would take the dower in preference to the provision by the will. Now, admitting that the insertion of a power of leasing is a matter of great weight in cases of this kind, it is certain that, in case of an ample provision being made for the widow out of assets, if that right were taken away, and dower insisted upon, there would be a material derangement of the testator's intention; because the dower would be taken against the power of leasing given to the trustees under the will: the extent of the provision under the will renders it almost a matter of certainty. But when the provision is so limited as to make it a matter of certainty that she would prefer to take dower, then that very derangement arising from the power of leasing, which was used as a circumstance to create the implication, operates the other way. Upon the whole, therefore, I cannot find in the whole will a necessary implication that he did not mean her to have both: because he gives a similar provision to a stranger; and, the annuity being so scanty, not being more than the gift to a stranger, it is not conceivable she would renounce her right of dower. The fact of the amount of the provision being an amount to which, in the opinion of any man of sense, dower would be preferred, annuls the presumption arising from the fact of the power of leasing having been granted. Upon the whole, in this case I am of opinion that there is nothing on the face of this will to rebut the right which the law gives to a widow to take her dower, and to take the provision given her by the will, unless upon the face of the will it is apparent that the testator intended she should not have both. My opinion is, that he intended she should have both; and I therefore declare the widow entitled to her dower, as well as to the provision under the testator's will.

THE LOGIC OF THE LAW.

In an old work by Judge Dodderidge, called *The Lawyer's Light; or, A Due Direction for the Study of the Law*, much stress is laid upon the use of logic in legal arguments. The following extract may amuse, and perhaps instruct the reader, who will thus find a contrast between things as they were in the "good old times" and as they are now:—

"Just. Conisby (Year Book, 14 Hen. 7, 3 b.) in order to prove that a man might grant his lease for yeares without Deed, vseth this plaine and expresse Syllogisme; whereof euery Proposition being a Ground and Principle in the Law, the conclusion necessarilly doth follow.

"1 Maior) Chose que ieo poy prender in lease sans fait poiet passer hors de moy sans fait.

"2 Minor) Et un lease de terre pur terme d'annees est bon sans fait.

"3 Conclusio) Ergo per mesme le reason il poit passer hors del Lessee, & ceo sans fait.

"Likewise a question grew (Y. B. 20 Hen. 7, 13 b.) whether the heire or executor were to haue a furnace fixed vnto the soyle, or such chattells as were annexed to the freehold after the death of the Testator, or no; where the Reporter putteth downe the opinion of *Reede* chiefe Iustice, *Fisher*, and *Kingsmill*, that the executors should not haue the same vnder the frame of this forme of Syllogisme; whereof euery Proposition is a Rule of Law.

"1 Maior) Ceux choses que ne poient este forfeit per vtлары in personall action, ne este attache in Assise ne distraine per le signor pur Rent, tiels choses executours naveront.

"Minor) Mes un furnace ou table fix sur la terre, ou posses, ou un pale, ou un couering de un licit merisme, ou bord annex al frank-tenant, ou house & fenesters, & auters tiels semblables queux sont annex al franktenement, & sont fait, pur un profit del inheritance, ne poient este forfeit per utлары, ne attache, ne distraine.

"3 Conclusio) Ex consequenti sequitur que executours naveront tiels choses."

LETTERS ON SIMPLE CONTRACTS.

[Continued from p. 88.]

Letter VI.—*Illegal contracts—General rules as to contracts contravening the law—Contracts in restraint of trade.*

We now proceed to notice the subject of illegal contracts, for it is not every contract which the parties choose to enter into that the courts will enforce. Indeed, it is a general rule that a contract or agreement cannot be made the subject of an action if it is open to the charge of dishonesty, or is opposed to public policy—i.e., if it be either *contra bonos mores* or be forbidden by the law (*per* Lord Kenyon, 6 Term Rep. 16); or, to use the words of Bacon's Abr. (tit "Assumpsit" E.), if the considerations of an agreement are wicked and ill in themselves, or unlawful by being prohibited by some act of parliament, they are void. In answer to an action founded on an agreement so tainted, the following maxims may be urged:—(1) *ex malificio non oritur contractus*; a contract cannot arise out of an act radically vicious and illegal; (2) those who come into a court of justice to seek redress must come with clean hands, and must disclose a transaction warranted by law; and, in addition, it is quite clear that a court of justice can give no assistance to the enforcement of contracts which the law of the land has interdicted (Broom's Max. 576, 2nd edit.).

Public policy.—The most usual term used to denote the illegality of contracts (and also conditions) is, that they are against public policy. Sometimes, indeed, it is said that contracts are illegal by statute, or by the common law, and that illegality at the common law is in various ways; as, being immoral, contrary to public policy, fraudulent, involving a criminal offence, &c.; but, in truth, all these enumerations as only of the matters which are void as being contrary to public policy. The subject of public policy avoiding limitations of estates, and also incidentally contracts, was much considered in the late well-known case of *Egerton v. Brownlow* (18 Jurist, 71). Mr. Justice Cresswell thought that it was used in an inaccurate manner, instead of the words "the policy of the law." Mr. Baron Parke (18 Jur. p. 85) observed, that "public policy" was a vague and unsatisfactory term, and calculated to lead to uncertainty and error when applied to the decision of legal rights: "It is capable of being used in different senses; it may, and does in its ordinary sense, mean "political expedience," or that which is best for the common

good of the community. . . . The term public policy may, indeed, be used only in the sense of the policy of the law, and in that sense it forms a just ground of judicial decision. It amounts to no more than that a contract or condition is illegal which is against the principle of the established law." According to Lord Truro (18 Jur. 100), "public policy is that principle of the law which holds, that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law." It has been decided that the question whether a contract is void, as contrary to public policy, is for the court, when the circumstances raising the question are conceded (*Tallis v. Tallis*, 1 Ellis and Bl. 391; S. C. 17 Jur. 1149; 22 Law Jour. N.S. Q. B. 185).

Before proceeding to notice some of the specific cases of illegal agreements, we have thought it desirable to mention some general rules applicable to all such contracts, which may be of service towards a full understanding of the many cases hereafter referred to.

Contracts contravening the law.—Where a covenant or contract which is sought to be enforced, whether it be an express or implied one, is expressly or by implication forbidden, no court of justice will give effect to it (*Selw. N. P.*, pp. 62, 63, 11th edit.). Thus, if a man covenant to pay an annuity, that annuity being one which falls within the provisions of the statute requiring the deed to be enrolled, the covenant is not enforceable. Again, if there should be a covenant in a deed or grant to charitable uses, the want of an enrolment will be fatal to the deed, and the covenant also fails, and is not enforceable at law. These are all instances exemplifying the rule, that contracts which contravene a rule of law will not be enforced.

Contracts ancillary to an illegal agreement.—The next rule is, that there is no distinction between a contract which is in itself void, and one which is ancillary or incidental to an illegal contract. Thus, in *Collins v. Blantern*, (2 Wils. 347; see *Prole v. Wiggins*, 3 Bing. N. C. 235; S. C. 5 Jur. 1171; 8 Jur. 826), an indictment for perjury against several persons being pending, the prosecutor, Rudge, the plaintiff, and the parties indicted, agreed that the plaintiff should give Rudge his promissory note for £350, payable one month after date, for not appearing to give evidence at the trial, and that the obligors should execute a bond to the plaintiff, of the same date with the note, as an indemnity to the plaintiff for giving such note. The bond was accordingly entered into, and being put in suit, the defendant pleaded the illegality. The court held that the whole transaction was to be considered as one entire agreement; for the bond and note were both dated on the same day, for the payment of the same sum of money on the same day; that it was an agreement to

stifle a prosecution for wilful and corrupt perjury—a crime most detrimental to the commonwealth—that the promissory note was certainly void; and, consequently, the plaintiff was not entitled to recover on the bond which was given to indemnify him from such note. In the case of *Cannan v. Bryce* (3 Barn. and Ald. 179) it was held that money lent for the express purpose of settling losses on illegal stock-jobbing transactions, and so supplied, could not be recovered back, although the lender was no party to the stock-jobbing. Another rule is, that although the illegality is in direct furtherance of an illegal contract, yet where the illegality consists of acts wholly *collateral*, though combined with the illegality, yet it is not void. See per C. J. Tindal, in his judgment in *Ferguson v. Norman* (5 Scott, 809; S. C. 5 Bing. N. C. 76; 3 Jur. 10).

Omission of statutory provisions.—Another rule is, that an omission out of the contract of provisions securing the observance of a statutory enactment does not make the contract void, even though in fact there may be a violation. Thus, in *Lewis v. Armstrong* (4 Moo. and Sc. 1; S. C. in Equity, 3 Myl. and Ke. 64), the L. C. said: “If, as in the present instance, we have before us a contract of partnership wholly silent upon the statutory obligation, to make the names public over the door (pawnbrokers), we have no right to argue from the *omission* that an infraction of the law was intended; on the contrary, we are rather bound to believe that a compliance with the law, being taken for granted as a matter of course, was not expressly mentioned in the articles as being thought superfluous. If again, such a contract, legal in itself, has been made, nothing done afterwards, how illegal soever, can operate to make the contract unlawful. But where the acting of the parties is illegal—where the contract being silent, the law is broken under it, though not by force of it, there arises a very natural suspicion that the written articles, though true as far as they go, do not contain the whole truth, and that another agreement was entered into collateral to the one in writing, and to which the illegal acting may be referred.”

Partial illegality.—Again, a contract may be illegal in one of its aspects, and yet the rest of the transaction may not be affected by the law which makes the one portion illegal (see *Lewis v. Davidson*, 4 Mees. and W. 654; S. C. 3 Jur. 387). Thus, is a charging of a benefice legal? So far as the contract is a covenant to pay it is enforceable, but as an express charge on the benefice it is void. That portion which is separable must be put out of view. Indeed, as to annuity transactions, the whole deed is rendered void, if not duly enrolled in cases where this is requisite, so that you cannot sue on a covenant in such a deed to pay. But in ordinary cases the rule is clear, that if an instrument contains distinct engagements, by which a party binds himself to do certain acts, some of which are

legal and some illegal at common law, the performance of those which are legal may be enforced, though those which are illegal cannot (*Bank of Australia v. Breillatt*, 6 E. F. Moore, 152).

Illegality may be shown by extrinsic evidence.—Again, there is no distinction with reference to illegality, on account of the instrument being under seal. What does this imply? It implies that you are at liberty to import into the case extrinsic matter. As before stated (vol. v. p. 3), a contract under seal (with the exception of one in restraint of trade) does not require any consideration to support it; therefore, even though a bond or conveyance should be expressed to be made on good or sufficient consideration, yet if it be shown by extrinsic evidence to be for an illegal purpose, it will be void; for unless the obligor were allowed to contravene it, it would be (as Lord Ellenborough observed) a means of covering fraud. See *Paxton v. Popham* (9 East, 421, 422), where Lord Ellenborough said: "It is true that you cannot add to a contract under seal anything to vary the contract; but you may show *dehors* the instrument that such contract was entered into for an illegal purpose (see also *Williams v. Jones*, 5 Barn. and Cres. 108; *Gas Light and Coke Co. v. Turner*, 6 Bing. N. C. 327; S. C. 7 Scott, 779).

Relief where not pari delicto.—It may be observed, that where the parties to a contract against public policy are not *in pari delicto*, and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, courts of equity will give him relief (*Reynell v. Sprye*, 1 De Gex Macn. and Gord. 660).

Illegality mala in se aut prohibita.—Another rule is that no distinction is to be taken between illegalities which are *mala prohibita* and those which are *mala in se* (see *Aubert v. Maze*, 2 Bos. and Pull. 371; *Cannan v. Bryce*, 3 B. and Ald. 179). This distinction was not always observed: thus in *Faikney v. Reynous* (4 Burr. 2069) it was said:—The defence relied on as furnishing a ground of defence against being liable to pay is not *malum in se*; it is only prohibited by this act of parliament (see 1 Bac. Abr. tit. "Assumpsit," E.).

Where revenue concerned.—Another distinction formerly supposed to exist has been repudiated. It was this—That where the purpose was to protect the revenue, a violation of the provisions of the statute was an answer to an action on a contract contravening such provisions; it was so held until so late as *Brown v. Duncan* (10 Barn. and Cres. 93). There we find the court making these remarks:—"These cases are very different from those where the provisions of acts of parliament have had for their object the protection of the public, such as the acts against stock-jobbing and the acts against usury. It is different, also, from the case where the

sale of bricks, required by act of parliament to be of a certain size, was held to be void, because they were under that size. There the act of parliament operated as a protection to the public as well as to the revenue, securing to them bricks of the particular dimensions. Here the clauses of the act of parliament had not for their object to protect the public, but the revenue only. Neither is this one of that class of cases where an attempt is made to recover the price of prohibited goods." In *Cope v. Rowland*, 2 Mees. and W. 149, the distinction between breaches of law for revenue purposes was distinctly overruled. There the court says:—"It may safely be laid down, notwithstanding some *dicta* apparently to the contrary, that if the *contract* be rendered illegal, it can make no difference in point of law whether the statute which makes it so has in view the protection of the revenue or any other object. The sole question is whether the statute *means to prohibit the contract?*" We must present this to our minds: was the act in question intended to be prohibited? if so, it will be void. The question is, was the object to secure some leading point in public policy, or was it merely designed to lay down a regulation which a penalty would be sufficient to enforce? These points were considered in the late cases of *Cundell v. Dawson*, 11 Jur. 634; S.C. 4 Com. Ben. Rep. 376; *Smith v. Mawhood*, 14 Mees. and Wels. 452; S.C. 15 Law Journ., N.S., Exchequer, 149. In this last case it appeared that the Excise License Act (6 Geo. 4, c. 81) imposes penalties on any manufacturer, &c., of tobacco, who shall not have his name printed on his entered premises, or who shall manufacture, &c., without a license; it was held that the effect was to impose a penalty on the offender for the benefit of the revenue, but that they did *not* render void a contract for the sale of tobacco made by a manufacturer or dealer who failed to comply with their requisites. But it was also held that if the legislature had intended to prohibit the contract itself, if only for the purposes of revenue, it would have been illegal, and no action could have been brought upon it.

Illegal intention.—Another rule is, that in determining the validity of a contract not on its face void, you must look only at the intention of the parties at the time; it is of no importance to show that, in fact, there is no illegality, for if there was an illegal design at the time of the contract it is void. It is true that the parties may change their minds, and may use the matter of contract in a different manner entirely, but still the entering into the contract with an illegal intention taints it with illegality. Thus in *Langton v. Hughes* (1 Mau. and Selw. 592, cited 10 Bing. 110, and 2 Myl. and Cr. 86), where the plaintiff, a druggist, after the 42 Geo. 3, c. 38, but before the 51 Geo. 3, c. 87, sold and delivered drugs to the defendant, a brewer, *knowing that they were to be used in the brewery*,

it was held that he could not recover the price of them. However, in such cases it must be shown that the party seeking to enforce the engagement was privy to the intended illegality (see *Lightfoot v. Tenant*, 1 Bos. and Puller, 567). However, a distinction exists where a specialty, as a bond, is given, not as a part of the original contract, but as a distinct and independent arrangement following upon the completion or abandonment of the original design; for there is no authority for saying that after the completion or abandonment of an illegal contract between two parties, they may not enter into a new agreement, though if such new agreement be by writing merely there must be a new consideration clearly shown, but if it be under seal, and so requiring no consideration, it is valid (*Fisher v. Bridges*, 17 Jur. 1151).

Lien under illegal contract.—A party cannot claim a lien under an illegal contract as arising by that contract. Nor will the court assist him on the supposition that there may be a good collateral contract; such a contract must be shown, and must be one that is enforceable. The presumption always is that there was only one binding contract between the parties on the same subject-matter (see *Ferguson v. Norman*, 5 Scott, 809; S.C. 5 Bing. N.C. 76; 3 Jur. 10).

Contracts in restraint of trade.—We now proceed to notice some of the cases of illegal contracts, or contracts against "public policy." And, firstly, we shall consider the important subject of contracts in restraint of trade — i.e., contracts whereby one person, either on his being engaged as assistant, clerk, &c., to a tradesman or professional man, or upon his selling to another his business, engages not to carry on a similar business within certain limits. These engagements are sometimes under seal, and at other times merely in writing, but this is only material as to the consideration. The cases have been very numerous on this subject, and we shall be compelled to notice them more in detail than usually, but we think our readers will rather thank than blame us for this.

Old case on the subject.—The rule which restrains such contracts when unlimited is admitted by most authorities to be founded on the rule of public policy. Such was the general conclusion of the judges in the case of *Egerton v. Brownlow* (18 Jur. 71). However, Mr. Just. Cresswell in that case (see p. 77) seems to disapprove of this, saying—"Contracts in restraint of trade have been said to be illegal as against public policy; but in truth it is part of the common law that trade shall not be restricted, as was held in the Year Book, 2 Hen. 5, P.C. 26; and unreasonable contracts in restraint of trade violate the policy of that part of the common law, and are therefore illegal." On this statement Lord St. Leonards has, in the same case (p. 110) expressed himself thus:—"Mr. Justice Cresswell says that with regard to the restraint of trade there is a maxim

in common law, and he refers to a case in the Year Book, 2 Hen. 5; to prove it. But the learned judge forgot to tell your lordships upon what that maxim was founded. Nobody supposes that there was any statute in those times; upon what, then, was that maxim founded? Why, upon public policy, for the good of the realm. It was not good for the realm that men should be prevented from exercising their trades. Now, let us see what this particular case is—it lies in a few words, and remarkable consequences have resulted from it. It is in the 2 Hen. 5, pl. 26, and it was an obligation with a condition that if a man did not exercise his craft, say of a dyer, within a certain town—that is, where he carried on his business—in six months, then the obligation was to be void; upon which, Hull, J., said, being uncommonly angry at such a violation of all law, according to the book, 'Par Dieu; if he were here, to prison he should go, just as if he had committed an offence against the king,' because he had dared to restrain the liberty of the subject. Strange, J., says that if the defendant had carried on his business for a certain time—say seven days within the time limited by the condition—that would have been enough. I have referred to this case to draw your lordships' attention to it. Angry as that learned Judge was at that infraction of the law, what has been the result of that very rule, without any statute intervening? That common law, as it is called, has adapted itself upon grounds of public policy, to a totally different and limited rule that would guide me at this day; and the condition that was then so strongly denounced is at this day just as good a condition that was ever inserted in any arrangement that was ever the subject of any statute, because a partial restraint created in that way with a particular object is now perfectly legal. Without any exclamation of the judge, and without any danger of prison, any subject of this realm may sue upon such a condition as Hull, J., was so very indignant at in that particular case. That shows, therefore, that the rule which the learned judge (Cresswell, J.) thought depended on some rule of common law, irrespective of policy, was founded on public policy, and has been restrained, and limited, and qualified up to this very hour, and beneficially so, by that very policy which has no bearing at all upon the foundation of the rule."

General rule.—It is a clear rule of law, that a covenant or agreement in total or general restraint of trade is void (*Mitchell v. Reynolds*, 1 P. Will. 181; Selw. N.P. 567, 11 edit.; 27 Law Mag. 214; 1 Story's Eq. Jurisprud. 236; Prin. Com. Law, 53—55). And this is so, though the agreement be supported by a consideration. In fact, nothing can make a total restraint of trade good, because, as we shall presently show, it is not the interests of the parties to the contract only which are affected, but those of the

public generally. A partial restraint of trade is good, if supported by a consideration, and the restraint be only a reasonable one (see 5 Com. Dig. tit. "Trade," D. 3; *Chesman v. Nainby*, 2 Strange, 739; S.C. 3 Bro. P.C. 349; *Rannis v. Irvine*, 7 Man. and Gr. 969; S.C. 8 Scott, N.R. 674; 14 Law Journ. N.S. C.P. 10; 8 Jur. 1051; *Pilkington v. Scott*, 15 Mees. and W. 657; S.C. 15 Law Journ. N.S. Exch. 329; *Nicholls v. Stretton*, 11 Jur. 1009). But even a partial restraint is not good unless it be reasonable under the circumstances of each case, and be supported by a consideration. We may remark that it is clearly settled now, that where a consideration appears in a deed, the court will not enter into the question whether the consideration be equal or not in value to the restraint agreed on (*Hitchcock v. Coker*, 6 Adol. and Ellis, 438; S.C. 1 Nev. and P. 798). As to whether the restraint be or be not reasonable, each case must depend upon its own circumstances, for there are no certain or precise rules by which this can be ascertained (see *Tallis v. Tallis*, 1 El. and Bl. 391; S.C. 17 Jur. 1149). The question of reasonableness or not is one for the court.

Consideration for restraint.—It is to be remarked, that no express consideration is required to be shown for the restraint on trading, where, as is usually the case, such stipulation arises out of a contemporaneous transaction supported by a consideration. Thus, this stipulation usually arises out of the sale of a trade, or the goodwill thereof, for which a consideration is paid, and then the contract of the vendor not to carry on the same trade within that place, or within a certain reasonable limit, is in fact part of the bargain, and founded on the same consideration (see *Mallan v. May*, 11 Mees. and W. 653, 666; *Hitchcock v. Coker*, 6 Ad. and Ell. 438). Besides the instance here put, there are the cases of a clerk to an attorney, &c., or assistant to a tradesman or manufacturer, or where a partner gives up his interest to his companion, and covenants that he will not use or carry on such trade or profession within certain limits, and lastly, where two or more persons entering into partnership mutually agree, that none of them shall, during the partnership, be engaged in any other trade or business. In all these instances there are a *bond fides* and value to which the contract operating in restraint of trade attaches. In such cases, therefore, there will be found to be a substantial consideration to justify the restraint, at least to some extent. The consideration is that of the principal transaction, which it may be fairly said would not have been entered into, except for the restriction, or at any rate, not on the terms stated in the agreement. No one would give the same consideration for the purchase of a business where the seller was to be at liberty to set up again as soon and as near the old place as he pleased. The clause of restraint merely operates to give a security that the

principal contract will be fairly and fully carried out. We may then conclude, that whenever a consideration exists in respect of the principal transaction, there will be a sufficient consideration to support the restraint. But sometimes it happens that each description of contract before enumerated exists without a substantial consideration appearing, for a party may relinquish a business in favour of another without any consideration paid; so a clerk or assistant may be engaged without receiving any salary, and so a partner may retire from a partnership without receiving any consideration for such retirement. In such cases, the covenant not to trade would appear to be without consideration, and therefore not binding, unless the restraint were very reasonable. But, in fact, it seldom happens in these cases, but that some kind of consideration sufficient to support the contract appears, for when a man relinquishes a business in favour of another, the latter usually covenants to pay the debts; when a partner retires he is indemnified against the debts; and the clerk or assistant is to receive a salary. In all these cases a sufficient consideration would appear to support the restraint. As to the case of the clerk or assistant, supposing no salary were given him, yet, if in fact there be an engagement to instruct him, that will support the restraint (see *Nicholls v. Stretton*, 7 Beav. 42; S.C. at Law, 11 Jur. 1009). With respect to the adequacy of the consideration, where it is an engagement to serve as a clerk or servant, and the agreement is, not to work for any other person during a certain term, some cases will presently be mentioned.

Consideration appearing in agreement.—We have before said that though the contract be under seal, yet some consideration must appear for the agreement in partial restraint of trade. This may, at first sight, seem in contradiction with the well-known rule that a specialty imports a consideration (see 4 Burr. 2225; 1 Steph. Com. 473, 2nd edit.; Selw. N. P. 482, 11th edit.), but it must be remembered that the presumption of the law is against the validity of the contract, and, therefore, it is not a case of supporting a contract against which nothing is shown, but it is to support a contract against which there is primarily an objection. In fact, although the law, from the deliberation and solemnity which accompany the execution of a deed, presumes a consideration, and delivers the covenantee from the necessity of proving it, yet that doctrine applies only where the deed is good on the face of it (see Selw. N. P. 482, 11th edit.; *Lowe v. Peers*, 4 Burr. 2225). This being so in the case of an agreement under seal, it is of course clear that an agreement, not under seal, in partial restraint of trade, can only be supported by an adequate consideration, the meaning of which may be collected from the following cases.

Thus an agreement, by which a brass-founder was to work exclusively for certain factors, for his and their lives, they not undertaking

to find him full employment, but, on the contrary, reserving liberty to employ others to execute their orders, in his trade, if they should think fit, and to put an end to the agreement at three months' notice, is bad, though London and six miles round were left open to the party to take orders from (*Young v. Timmings*, 2 Tyr. 226; S. C. 1 Cr. and Jerr. 331). So an agreement that defendant, a moderately skilful dentist, would abstain from practising over a district of 200 miles in diameter, in consideration of receiving instructions and a salary from the plaintiff, determinable at three months' notice, was held unreasonable and void, being a restraint of trade, not founded on an adequate consideration (*Horner v. Graves*, 7 Bing. 135; S. C. 5 Moo. and Pay. 768. See also *Rex. v. Lord*, 12 Jur. 1001; *Pilkington v. Scott*, 15 Mees. and Wels. 657; *Hartley v. Cummings*, 2 Car. and K. 433).

Restraint as to time and space.—A partial restraint of trade as to place is not void because it is indefinite as to time (see *Ward v. Byrne*, 5 Mees. and Wels. 548). But a restraint limited as to time and unlimited as to space is void. The law looks to the extent in space, and not in time. How are we to decide as to the reasonableness of the restraint? The general rule is, that the restraint must not be larger than is necessary for the protection of the trader. In determining this reasonableness, reference must be had to one or other of the following particulars. The limit will refer either to the time of carrying on the business, or the place or district in which the business is not to be carried on, as so many miles from A., or it will refer to the mode of carrying on the business, and that either directly or indirectly, as, for example, that the party shall not act as assistant in the same trade to any others within the limited district. Where the limit is general and indefinite as to time, it will be important to look at the restriction as to the extent of district, in order to form a judgment as to the reasonableness of the restriction. So, if the restriction extend throughout the kingdom, and to every mode of carrying on the business it is void, even though the time be limited, and even if the restriction do not extend to every part of the kingdom, yet if it be unreasonable, having regard to the particular business, as if it extend to all modes of carrying on the business, it is void. There may be no qualification as to place, yet if it apply only to certain modes of carrying on the business, as, for example, except as an assistant, and the party is thus at liberty to carry on the particular trade in some other form, namely, as a master, the contract is a valid one, for the restriction is not an absolute one, but permits the party to carry on the trade in any other mode than that stipulated against. Such an agreement is valid, though the restriction be unlimited as to time and place, if there be a sufficient consideration. The following cases will illustrate these remarks,

namely, *Wallis v. Day*, 2 Mees. and W. 273; S. C. 1 Jur. 73; *Nicholls v. Stretton*, 7 Beav. 42; S. C. at Law, 11 Jur. 1009; *Pilkington v. Scott*, 15 Mees. and W. 657; S. C. 15 Law Journ. N.S. Exch. 329. In the case of *Wallis v. Day*, it appeared that the plaintiff, by deed, sold to the defendants his business as a carrier between London and Wisbeach, and in consideration of the covenants therein contained, on the defendants' part, covenanted with them that he would not thenceforth, during his life, exercise the trade of a carrier, except as thereafter mentioned; and that he would thenceforth, during his life, faithfully serve the defendants as an assistant in the trade of a carrier; and the defendants, in consideration of the before-mentioned covenants, and the plaintiff's faithful service as aforesaid, covenanted to pay him a certain weekly sum for his life. In an action against the defendants on this covenant, it was held that the plaintiff's covenant to serve during his life was good, and that the covenant in restraint of his trade was not void, inasmuch as he was not absolutely restrained from carrying on the trade, but only from carrying it on in any other way than as an assistant to the defendants. That a covenant extending to the whole life of the covenantor is valid where the space is limited, and that the time will not be shortened by reason of the failure of the subject-matter of the contract, as the ceasing to carry on the particular trade sold, see *Elves v. Croft*, stated *infra*, p. 212.

Separating contract.—A covenant which is void and illegal in part, as being an unreasonable restraint of trade, may be valid as to another part, which provides for a restraint not unreasonable. This was so decided in *Green v. Price* (13 Mees. and W. 695; S. C. 14 Law Journ. N.S. Ex. 105; 9 Jur. 857, and in the Exchequer Chamber, 16 Mees. and W. 346; S. C. 16 Law Journ. N.S. Ex. 108). In that case the defendant, for valuable consideration, covenanted not to exercise certain trades during his life, within the cities of London and Westminster, or within the distance of 600 miles from the same respectively; and it was held—Firstly, that the covenant was good so far as it related to London and Westminster, but that the rest was void, as being an unreasonable restraint of trade. Secondly, that the part relating to London and Westminster might be enforced, notwithstanding the illegality of the rest.

Reasonableness at the time of the contract.—An agreement which is reasonable at the time of entering into it, will not be deemed void on account of a possible, but not very probable, inconvenience to some third person. Thus, in the before-mentioned case of *Rannie v. Irvine*, an agreement was made for the sale of the good-will of the business of a baker in London, and it contained a clause that the vendor would not, during a certain number of years, knowingly supply bread or flour to any of their customers at the said premises

without the consent in writing of the vendee for that purpose first obtained. In an action brought to recover damages for the breach of this agreement, it was contended that the restriction was larger than the plaintiff required; and this case was put: suppose, after this agreement, that the defendant was the only person carrying on the trade of a baker at a small country village, at or near which a former customer came to reside, if this agreement be held to be binding, the latter would, perhaps, be unable to obtain either flour or bread. But the court held the agreement valid, and C. J. Tindal said: "If the restriction were reasonable at the time the contract was entered into, we are not to look for extravagant suppositions, for the purpose of making it unreasonable in its effect, and therefore void. The case of *Hunlocke v. Blacklow* (2 Will. Saund. 155 a), was considered as in point. In that case the names of the customers were inserted in a schedule to the agreement, and the covenant was that the vendor would thenceforth leave off and desist from using and exercising the trade of a tailor, with any of the customers named in the schedule. No observation was made by the court or the counsel upon the absolute restriction upon dealing with any of the customers of the plaintiff. If there had been any weight in the objection, it is reasonable to suppose that it would have been taken."

Decisions on restraint of trade.—The more important cases, as to agreements in restraint of trade, are *Chesman v. Nainby* (2 Stra. 739; S. C. 3 Bro. P. C. 349), in which it was clearly settled that contracts to restrain a party from setting up or exercising a particular trade or employment within a certain *limited district*, for *valuable consideration*, are valid. *Mitchell v. Reynolds* (1 P. Will. 181) is a very important case, establishing the general rule that all restraints of trade, if nothing more appears, are invalid. *Hinde v. Gray*, 1 Scott, N. R. 123; *Ward v. Byrne*, 5 Mees. and W. 548; *Procter v. Sargeant*, 2 Man. and Gr. 20; S. C. 2 Scott, N. R. 289; *Bunn v. Guy*, 4 East, 190; *Whittaker v. Howe*, 3 Beav. 383; S. C. 11 Jur. 1053, note; *Hitchcock v. Coker*, 6 Adol. and Ellis, 438; *Rannie v. Irvine*, 8 Scott, N. S. 674 (stated *supra*); *Green v. Price*, 13 Mees. and W. 695; S. C. 14 Law Journ. N. S. Exch. 105; 9 Jur. 857; S. C. in error, 13 Mees. and W. 695; 9 Jur. 880; *Tainter v. Ferguson*, 7 Com. Bench Rep. 716; S. C. 13 Jur. 828; 18 Law Journ. N. S. C. P. 217; *Atkyns v. Kinneir*, 4 Exch. Rep. 776; S. C. 19 Law Journ. N. S. Ex. 132; *Elves v. Crofts*, 10 Com. Ben. Rep. 241; S. C. 14 Jur. 855; 19 Law Journ. N. S. C. P. 385; *Tallis v. Tallis*, 1 Ellis and Bl. 391; S. C. 17 Jur. 1149; 22 Law Journ. N. S. Q. B. 185. There are other cases either before mentioned or referred to in the cases just mentioned. These cases will fully support the proposition before enunciated, namely,

that when the carrying on a trade is restricted generally as to space, and extends to all modes, the restriction is unreasonable, though confined to a very short period of time, as for even less than a year. It is the same, though the restriction be to a certain space, if that district be not a reasonable one, and all modes of carrying on the trade or business be restrained. Though, as before stated, the restriction as to time is unimportant, if the agreement be otherwise legal, yet the direction as to time may be important in complex cases, where there is any doubt as to the legality of the other provisions (*Bunn v. Guy*, *Whittaker v. Howe*).

Bunn v. Guy—Whittaker v. Howe—Sale by attorney of his business.

—We will notice some of the cases above cited. In *Bunn v. Guy*, an agreement was entered into by a practising attorney in London, to relinquish his business and recommend his clients to two other attorneys, and that he would not himself practice in such business within London, and one hundred and fifty miles therefrom, and that he would permit them to make use of his name in their firm for one year. This was held to be a valid agreement, and that, though the restriction was indefinite as to time (7 *Bunn v. Guy*, 4 East, 190). In *Whittaker v. Howe* (3 Beav. 383; S. C. 11 Jur. 1053, note), the defendant, an attorney, agreed not to practise as a solicitor, &c., in any part of Great Britain for twenty years, and the Master of the Rolls held the agreement valid. It seems difficult to maintain the correctness of this decision, and it is remarkable that it is the only case in which a restraint extending throughout the whole of England has been held valid. The principle of this decision must be taken to be, that from the nature of the business the Master of the Rolls thought it necessary in applying the admitted rule, that the restriction is co-extensive with the required protection, that the restraint for such a purpose must be throughout the kingdom. We must suppose that the court referred to the extent of business and the nature of the connection in the particular case; at any rate, it is clearly not supportable on any other supposition, even if it be on that. In the case of *Horner v. Graves* (7 Bing. 743), Tindal, C. J., says: "We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either; it can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void, on the ground of public policy."

Hitchcock v. Coker—Assistant in a business—No limit as to time.—

This was an action of assumpsit. The declaration stated that before

and at the time of the promise plaintiff was a druggist, and had taken defendant into his service as an assistant at an annual salary, on condition (amongst other things) that the defendant should enter into and perform the agreement after mentioned, that defendant, in consideration of the premises, and in the performance of the condition by an agreement reciting as above, agreed with plaintiff that if defendant should at any time thereafter exercise the trade or business of a chemist or druggist in the town of T., or within three miles thereof, defendant should pay plaintiff £500 as liquidated damages. It was held by the court, first, that there was a legal consideration for the contract; secondly, that the court could not enter into the question whether the consideration was equal in value to the restraint agreed on by the defendant; and, thirdly, that the restraint was not shown to be unreasonable or oppressive, by the circumstance that its duration was not limited to the life of the plaintiff, or to the time during which he should carry on the business (*Hitchcock v. Coker*, 6 Adol. and Ellis, 438).

Mallan v. May—Assistant—Too large a restraint—Divisible contract.—There A. B. agreed, by articles under seal, to enter the service of C. D., as assistant to him in his business of surgeon-dentist, for a period of four years; and the agreement contained a covenant, that after the expiration of that term A. B. would not, without the consent in writing of the other, carry on the business of a surgeon-dentist in London, or any of the towns or places in England or Scotland where C. D., or A. B. on his account, might have been practising before the expiration of the above service; held, first, that this covenant, so far as it related to London, was not, but that, as to its other provisions, it was void, as imposing an unreasonable restraint of trade; and, secondly, that the covenant was divisible, so that the illegality of the second branch did not vitiate the whole (see as to the construction to be put on "London," the same case on case out of equity, reported 13 Mees. and Wels. 511; S. C. 14 Law Journ. N.S. Exch. 48; 9 Jurist, 19). It was also held in the first case of *Mallan v. May* (and this is the principle of all the cases), that all restraints of trade, which are larger than are necessary for the protection of the party with whom the contract is made, are unreasonable, and void as against public policy; and that whether a contract in restraint of trade be reasonable or not, is a question of law to be determined by the judge, and not a matter of fact to be left to a jury. In the same case it was said (seemingly) that, in estimating the reasonableness of a contract not to exercise a trade or profession within a particular district, the populousness of the district is not to be taken into account.

Nicholls v. Stretton—Articled clerk—Too extensive—Divisible.—In this case the declaration in covenant on an indenture, which, after

reporting that defendant had for four years been plaintiff's salaried clerk, and requested plaintiff to accept him as articled clerk without payment of any premium, which plaintiff consented to do on defendant entering into the covenants thereafter contained, and that defendant had bound himself clerk to plaintiff for five years, to the intent that he might become entitled to make application to be admitted attorney and solicitor; stated that the defendant covenanted that he would not, during the said term of five years, nor at any time after the expiration of such term, either directly or indirectly, interfere or intermeddle with, or be concerned as attorney, agent, or otherwise, for any person who had already been, or should thereafter become or be, the client or correspondent in business of or with plaintiff, or any partner he might admit to a share with him, or any person to whom he might sell or assign the whole or any part of his business or profession; and that defendant would not act as partner, clerk, or assistant with or to any person who should interfere or intermeddle as aforesaid; and in case defendant should commit any breach of his said covenants, he should forfeit £. 00 for every such breach; held, that the covenant was divisible, and that an action was maintainable against the defendant for being concerned as attorney for persons who were clients of the plaintiff at the date of the deed. The court held that the decision in *Green v. Price* ruled the present case (*Nicholls v. Stratton*, 10 Qu. Ben. Rep. 346; S. C. 11 Jur. 1009). It should be stated that this case came out of equity, which had directed a case for the judges at common law. In equity (see report in 7 Beav. 42), the court had granted an injunction to restrain the clerk, after the expiration of his articles, from acting for persons who had been clients of the master during the articles, and this, though it appeared by the articles of clerkship that there was a stipulation that the master might put an end to the period of the articles at any time upon one week's notice. It will thus be seen that the above decisions, as also the decision hereafter mentioned of *Tallis v. Tallis*, get rid of the difficulty which might arise as to the covenant being too extensive.

Sainter v. Ferguson—Assistant—Liquidated damages.—This was an action of assumpsit upon a written agreement, whereby, in consideration that the plaintiff, a surgeon at M., would engage the defendant as his assistant, the defendant promised that he would not at any time practise at M., or within seven miles of it, under a penalty of £500; it was averred in the declaration that the plaintiff did engage the defendant upon the terms of the said agreement. It was held by the Court of Common Pleas that the declaration disclosed a good consideration for the defendant's promise, and that the agreement was not void, as being in restraint of trade. Also, that the £500 was recoverable as liquidated damages (*Sainter v. Ferguson*,

7 Com. Ben. Rep. 716; S. C. 13 Jur. 828; 18 Law Jour. N. S. C. P. 217). The first point was decided on the principle we explained before, namely, that all the court requires to support such agreements is a consideration, and that it will not inquire into its adequacy. As to the second point, the court concluded that the parties intended that the penalty should be liquidated damages, from the difficulty which would exist in ascertaining the actual damage which might have been incurred by the plaintiff—the penalty was, therefore, taken as the measure of damages agreed upon by the parties for a breach of the engagement.

Atkins v. Kinnier—*Measuring distance*—*Liquidated damages*.—It appeared that the defendant covenanted that he would not at any time practise or carry on the profession of a surgeon at No. 28, Dorset-crescent, or within a distance of two miles and a-half thereof, measuring by usual streets or ways of approach thereto, nor reside within the distance of two miles and a-half of No. 28, Dorset-crescent without the consent of plaintiff; and if the defendant infringed the stipulation, he should pay plaintiff £1,000 as liquidated damages, and not by way of penalty. It was held by the Court of Exchequer that the distance was to be measured not by the most frequented public ways, but by any of the usual public ways. Also that the stipulation as to residence was not void as being in restraint of trade, or as contrary to public policy. And further it was held, that the sum payable was to be considered as liquidated damages, and not as a penalty (*Atkins v. Kinnier*, 4 Exch. Rep. 776; S. C. 19 Law Jour. N. S. Exch. 192).

Elves v. Crofts—*No restriction as to time*—*Goodwill of business*.—It was decided in this case by the Court of Common Pleas that a covenant, on the part of the vendor of leasehold premises and of the goodwill of the business carried on thereat, not to carry on a similar business within a specified (reasonable) distance of the premises, is not limited to the existence of the term assigned, nor extinguished by the fact that the business has ceased to be carried on at the premises or elsewhere, either by the purchaser or by any assignee or licensee of the purchaser. The covenant was in the following terms:—"That the defendant (the assignor) shall not nor will at any time or times hereafter, either by himself alone, or jointly with or as agent, journeyman, or assistant, for any person or persons whomsoever, either directly or indirectly, or upon any account or pretence whatever, set up, exercise, or carry on, or be employed in carrying on, the trade or business of a butcher, within five miles from the said messuage or premises hereby assigned; and shall not, nor will, either by himself or by or with any other person or persons, do or cause to be done any wilful act, matter, or thing, to the prejudice of the trade or business of a butcher, to be thereafter carried on by the

plaintiff (the purchaser), at or upon the same messuage and premises, but on the contrary, shall and will endeavour to promote the interest of the plaintiff, among the customers of the defendant, and otherwise; and that if the said defendant shall do any act in breach or violation of this present covenant, then he the said defendant shall and will immediately pay to the plaintiff, his executors, &c., the sum of £300, to be deemed and considered, and the same is hereby declared to be, as and for liquidated and ascertained damages, and not in the nature of a penalty. The defendant pleaded: first, *non est factum*. Secondly, denial of any breach of the covenant. Thirdly, that the business of a butcher (which was the business carried on by the defendant) had ceased to be carried on at the premises or elsewhere, by the plaintiff, or by any one on his behalf, or under any assignment of the good-will, or any license from the plaintiff. Fourthly, that before the breach, the term in the premises had determined by effluxion of time. On motion to the court after a trial, Mr. Just. Talfourd (who delivered the judgment of the court) was of opinion that there was no pretence for limiting the duration of the covenant to the term assigned. On the other points it was contended, on the part of the defendant, that the covenant must be taken with the qualification mentioned in the third plea; for that, although it was decided by the cases of *Hitchcock v. Coker* (6 Ad. and El. 488); *Mallan v. May* (11 Mees. and Wels. 653); *Rannie v. Irvine* (7 Man. and Gr. 969); *Pemberton v. Vaughan* (10 Qu. Ben. Rep. 87); *Hastings v. Whitley* (2 Exch. Rep. 611); and *Atkyns v. Kinnier* (19 Law Journ., N. S. Exch. 132), that a restriction, reasonably limited as to space, but enduring for the life of the party restrained, was valid as the only effectual mode of securing to the covenantee the full benefit of the good-will of his trade; yet those decisions being based on the assumption that such a restriction was necessary for the entire protection of the covenantee, must be construed as ceasing to operate when the covenantee has ceased to carry on the business assigned, either by himself or his assigns. The court, however, held that this reasoning was fallacious; and that the covenant, being binding to its full extent (*viz.*, for the life of the covenantor) when made, could not be varied by any subsequent occurrence; that to hold otherwise would be to render its import uncertain, and to impair the efficiency of the covenant for the protection of the covenantee; for that cases might be conceived in which the good-will of the business might not be at once extinguished by its ceasing to be carried on; and the saleable quality of the good-will was, according to the recent decisions, to be protected (*Elves v. Crofts*, 10 Com. Ben. Rep. 241; S. C. 14 Jur. 855; 19 Law Journ. N. S. C. P. 385).

Tallis v. Tallis—Limited to 150 miles—Dissolution of Partner-

ship.—The declaration stated that the plaintiff and the defendant had carried on in partnership the business of publishers in various places in Great Britain and Ireland, at a greater distance than 150 miles from the General Post-office, London, of which a certain branch was known as the canvassing trade, consisting of publishing in parts, works, in some of which the copyright had ceased, and of employing canvassers to go from house to house to solicit purchasers for such publications, and that upon the dissolution of the partnership the defendant covenanted that he would not at any time thereafter carry on that part of the trade of a publisher known as the canvassing trade within the distance of 150 miles from the General Post office, London. Breach that the defendant carried on the canvassing trade in London, and within 150 miles of the General Post-office; it was held that the restraint was not unreasonable; *semble* also that part of the covenant which restrained the defendant from carrying on the canvassing trade in Edinburgh or Dublin, or within fifty miles of either of them, or in any place in Great Britain or Ireland where the plaintiff, or his successors in the business, might by themselves or their agents at any such time carry on the trade, or might have carried it on within six months preceding, was not unreasonable. Such a covenant is valid unless it plainly appears that a restriction is imposed by it beyond what the interest of the plaintiff requires (*Tallis v. Tallis*, 1 El. and Bl. 391; S. C. 17 Jur. 1149; 22 Law Journ. Rep. N.S. Q. B. 185).

NOTES OF RECENT LEADING CASES.

WILL.—"Issue"—"*Dying without issue*"—*Estate tail by will—Gift to A. for life, then to his issue and their heirs*—[*Kavanagh v. Morland*, 18 Jur. 185].—No words have been so productive of litigation as those of "*Issue*" and "*Dying without issue*." The above case lays down some general rules which may be of assistance to the student as well as to the practitioner. The 1 Vict. c. 26, s. 29, respecting the construction of the words "*Dying without issue*," was not applicable to the case, as it was a very old will, but we shall presently notice its provisions, in connection with the above decision. We must first premise that words of *division* alone in a will do not make "*issue*" a word of purchase. Thus it was decided in the case of *Doe v. Applin* (4 Term Rep. 82), and recognised in the above case of *Kavanagh v. Morland*, that by a devise to A. for life, "and after his decease *to and amongst* his issue, and in default of issue" to others, A. took an estate tail. And this has been so

held, where the limitation was expressed to be to the issue "as tenants in common" (*Doe v. Cooper*, 1 East, 229). The positions laid down by V.C. Wood in the above case of *Kavanagh v. Morland*, were the following:—1. "Issue may *prima facie* be taken as equivalent to "heirs of the body;" but the court will lean more to cut down this effect of the former word by applying to it other portions of the will than the effect of the latter. 2. If there be a gift to A. for life, with another gift over to issue with words of limitation superadded, the issue take as purchasers in fee, fee tail, &c., as the case may be, and therefore where there has been a preceding gift to the issue of A. and their heirs, a subsequent gift over upon A. dying without issue, operates nothing. 3. Gift of lands to "the issue of A., as three persons shall affix the same," does not of itself give to the issue anything beyond a life estate, but points only to a power of partition and distribution. The testator, by his will, in the above case, gave to his wife and granddaughter A. during their natural lives all his freehold and leasehold lands, except the leaseholds therein mentioned. The testator then gave his mansion-house at Moat House to his wife for life, and declared that if A. should die leaving issue, he gave unto her, said issue (after the decease of his wife and sister) all his said freehold lands to be distributed among them, share and share alike, as three gentlemen learned in the law or a major part of them should affix the same. But in case A. should die leaving no issue, and after the decease of his said wife, the testator gave the same lands to trustees to sell and distribute the purchase money among certain grandchildren therein mentioned: it was held that A. took an estate tail in the premises at Moat House (*Kavanagh v. Morland*, 18 Jur. 185). Sir W. P. Wood in his judgment said:—"The words are, 'all my freehold and copyhold lands.' 'If I leave issue, then I give to the said issue all my said freehold and copyhold lands, to be distributed between them, share and share alike,' clearly, as far as that goes, would make them tenants in common for life. Then the testator goes on, 'share and share alike, as three gentlemen learned in the law, or the major part of them, shall affix the same.' Now, clearly, there is no power given to these 'gentlemen learned in the law' to give any estate to these parties. Their estate is limited to them, as it appears to me, share and share alike, most distinctly as tenants in common; but what the 'gentlemen learned in the law' affix to to them passes in severalty that which is given to them to hold in common. It is not an estate and interest, but a subject-matter of property which they are to affix and measure out and apportion—the particular property which each individual of the issue is to hold. If I give lands to A., B., and C., to hold to them as tenants in common, with power to D., E., and F. to make partition amongst them,

that certainly will not extend their life interest to a fee. The words in the will point to nothing beyond. No authority is vested in these 'three gentlemen learned in the law' to give any fee or interest to these parties, or do anything more than simply to determine the particular lands which they or each of them should hold in severalty. Then, if that be so, the only remaining question is, whether the gift over in this case is to take effect on the indefinite failure of issue. The first words are clear—'if I shall die leaving no issue, then I give and bequeath to the minister, churchwardens, and overseers of the poor all my freehold, copyhold, and leasehold estates, whatsoever and wheresoever, Leggatt's excepted, if my said sister be living.' Mr. Prior very properly said that he did not rely on those words in any way, standing by themselves. They merely mean 'subject to the life interest of my wife as to the one property, and of my sister as to Leggatt's.' But then you come afterwards to these words, 'that they are to sell the property, and divide the proceeds between the grandchildren;' and absolute interests being given to the grandchildren, not life interests only, the argument is, that it would fall within the rule mentioned in that last case before Sir William Grant, viz., that that is an indefinite gift, transferable to their representatives—that is, to be divided and paid among the grandchildren (*Curtis v. Price*, 12 Ves. 89). But then there comes this clause—'But if my sister Susannah shall outlive my said granddaughter Ann, then Leggatt's not to be sold until after the decease of my sister.' Now, Mr. Prior says upon that, that this is not to be sold if the sister outlives the granddaughter, and therefore infers that otherwise the sale of the property was intended to take place immediately on the death of the granddaughter. It is, therefore, sought to be inferred that the gift over was to take place immediately on the decease of the granddaughter. But I do not think that I can, upon an inferential gift of that kind, so limit the bequest. It might well be that the contrary event might take place; Susannah might not outlive the granddaughter; the granddaughter might survive her, and die leaving issue; and in that event it is consistent with the whole will to say that the sale shall not take place until after failure of that issue, taken indefinitely. This circumstance probably only occurred to the mind of the testator just as it occurred in the previous part, viz., 'Leggatt's excepted, if my sister Susannah be living.' Just as he had said that in the previous part; so here he interposes and says, 'Remember, whenever the event takes place, all this is to be done, subject to the life interest of my sister Susannah.' I do not think it carries it higher than the other cases. There is something, perhaps, a little more tending towards showing that there might have been in the view of the testator an intention that it should be sold immediately after the granddaughter's death;

but if there were issue, that circumstance guarded against the sale; and on the other hand, the sister dying in the lifetime of the grand-daughter, it would still be consistent with his general intention that the sale should not take place until after the death of his grand-daughter, and failure of her issue. I cannot say there is enough here to fix so plainly and clearly the period of division as to overrule the now quite settled effect of those words, 'leaving issue,' which, in the case of a real estate, means an indefinite failure of issue. Then it comes back to this—that there is a gift to one for life, with a gift over to the issue of the first taker, expressed in terms, in the first instance, not sufficient to carry more than a life estate to that issue; and further, on a clear gift over upon an indefinite failure of issue of the first taker. That brings it, in truth, to the case of *Doe v. Applin* (4 T. R. 82)."

We have said that the above case turned on an old will made prior to the New Wills Act, the 1 Vict. c. 26. Our readers are aware that sect. 29 of that act provides, that in any devise or bequest of real or personal estate, the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, *unless* a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise. &c. In a case decided in Ireland (*re O'Bierne*, 1 Jones and Lat. 352) a bequest of personalty was made (by a will executed subsequently to the passing of the 1 Vict. c. 26) to John and James O'Bierne, to be divided equally, with a request to John, that "should he die *without lawful issue*, the property which I bequeath him shall revert back to the sons of James." There was a reference to the Master, who found that John and James O'Bierne were absolutely entitled to the residuary property of the testator in equal shares. Counsel for John O'Bierne said, that before the 1 Vict. c. 26, a bequest in the terms used in the will would have given the absolute interest to the legatee (*Lepine v. Ferard*, 2 Russ. and Myl. 378). That there was nothing in the will to confine the words to the event of John dying without issue living at the time of his death, and that it is difficult to say from what it is that the court is to infer the intention of the testator, if the words of the bequest over are to be rejected. However, the present Lord St. Leonard's held that John did *not* take the absolute interest in a moiety. He ruled that in ascertaining whether the words "die without lawful issue," &c., in a

will made subsequently to the 1 Vict. c. 56, means an indefinite failure of issue, an intention is not to be inferred from the use of those very words. He said: "The point raised is that the words introducing the bequest over, would, by implication, have given to John an estate tail in real estate, and therefore, the absolute interest in personalty; and I assume that they would have done so before the late statute of wills. That act, however, contains this provision: 'That in any devise or bequest of real or personal estate, the words "die without issue" (which is the same thing as die without lawful issue), or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime, or at the time of the death of such person, and not an indefinite failure of his issue.' If the act had stopped there, this being a gift over in case John should die without issue, which words may import either of the two constructions mentioned in the act, it is plain that they must be construed to mean a failure of issue at the time of the death of John. But then come the words, unless a contrary intention shall appear by the will (1st) by reason of such person having a prior estate tail; or (2ndly) of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue; or (3rdly) otherwise. If a gift is to a man in tail, and for want of issue over, there the contrary appears; for the whole line of issue is provided for by the antecedent gift, and the words introducing the gift over must refer to the same interest; therefore, in such a case, 'or want of issue' mean an indefinite failure of issue. So, if upon the true construction of the will, without making use of any implication arising from the words introducing the gift over, the first taker takes an estate tail, the words equally import an indefinite failure of issue. But we are not to infer an intention from the use of the very words; therefore, if there be a gift to one for life, and if he die without issue over, there a contrary intention does not appear: for in such a case, the supposed estate tail is an estate arising by implication only, from the use of those very words. In the present case supposing that it were a devise of real estate, John would not take an estate tail unless by implication, arising from those very words; therefore, the case does not fall within the exception in the act. Then, as to the words 'or otherwise,' there is nothing in this case to show 'otherwise' an intention that John should take an estate tail, for no such intention is to be collected from this will, except from the indefinite use of the words introducing the gift over, and which the act excludes from consideration. My opinion is, therefore, that the children of James are interested in the moiety of the residue of the personal estate bequeathed to John."

THE EDUCATION OF LAW STUDENTS.

We now give the "Prospectus of Lectures" during the Educational Term, in and after Hilary Term, 1854, by the readers of the various inns of court, in continuation of those *ante*, pp. 72—75.

EQUITY.

The Reader on Equity proposes to give, during the ensuing Educational Term, a course of nine public lectures on the Relief afforded by the Court of Chancery, which depends upon Principles not recognised or applied by Courts of Common Law.

I. In Matters of Trust :—1. On the Creation of Trusts. 2. On the Relation between Trustee and *Cestui que Trust*. 3. On the Qualities of Trust Estates in general. 4. On Trusts for the Benefit of Married Women. 5. On Trusts for Charities.

II. In respect of Penalties and Forfeitures :—1. The General Doctrine of Equity on this subject. 2. Application of the Doctrine to Mortgagees.

III. In Cases of Mistake and Accident :—In matters of Agreement. 2. In the Execution of Powers. 3. In other instances.

In addition to the public lectures, it is proposed that two classes shall be formed, as during the preceding terms, for the study of the principles and practice adopted by Courts of Equity; each class to meet for one hour three times a-week. The junior class will read Smith's Manual of Equity Jurisprudence, commencing with the chapter on "Express Charitable Trusts;" portions of Fonblanque on Equity; the Act for the Improvement of the Practice and Course of Proceeding in Chancery, 15 & 16 Vict., c. 86.

The senior class will read Story's Commentaries on Equity Jurisprudence, Vol. II., commencing with the chapter on Assignments; White and Tudor's Leading Cases, Vol. II., commencing with *Woollam v. Hearn*; Mitford's Pleadings in Chancery, commencing with the chapter on Demurrers, at the second ground of Demurrer. Each student will be expected, in the intervals between the meetings of the class, to peruse portions of these and other works pointed out by the reader, and to be prepared, at the ensuing meeting of the class, to answer and discuss questions arising out of the subjects of their reading.

The Reader on Equity will deliver his public lectures at Lincoln's-inn-hall, on Thursday in each week during the Educational Term, commencing at two o'clock p.m. (the first lecture to be delivered on the 19th January). The Reader will receive his private classes

on Monday, Wednesday, and Friday evenings in each week, from seven to nine o'clock, in the Bencher's Reading-room at Lincoln's-inn-hall.

LAW OF REAL PROPERTY, &c.

The Reader on the Law of Real Property, &c., proposes to deliver, in the ensuing Educational Term, a course of nine public lectures on the Construction of Deeds and Wills.

I. The Construction of Words in a Will importing an Indefinite Failure of Issue; 1. Vict. c. 26, s. 29.

II. The Estate taken by Trustees under a Devise; sections, 30, 31.

III. The Doctrine of Lapse; sections, 32, 33.

IV. The General Rules of Construction applicable to Deeds and Wills:—Estates by Implication; Cross Remainders; Doctrine of *Cy-Près*; Rule in *Shelley's Case*; Effect of Recitals; Conditions; Mistake; *Falsa Demonstratio non nocet*; Verbal Alterations and Transpositions; Influence of Intention.

V. The Admissibility of Extrinsic Evidence with Reference to—"The Subject and Object of Disposition;" Cumulative and Substitutional Legacies: Double Portions; Satisfaction; Resulting Trusts.

The lectures to be delivered to the private classes will comprise the following subjects:—With the *senior* class, the text of Sugden on Powers will form the basis of the lecture; and the latest decisions, illustrating the principles there laid down, will be examined and commented on. With the *junior* class, the subject of the lectures will be Uses and Trusts, and the text-book, 1 Cruise, Dig. tit. xi. xii.

The public lectures will be delivered at Gray's-inn-hall, on Friday in each week, at two p.m. (the first lecture to be delivered on the 20th of January). The private classes will be held in the North Library of Gray's-inn, every Monday, Wednesday, and Friday morning, from a quarter to twelve to a quarter to two o'clock.

COMMON LAW.

The reader on Common Law proposes to deliver during the Educational Term, commencing the 11th January, 1854, a course of nine public lectures, on Practice, Pleading, and the Law of Torts. The subjects to be discussed in these lectures will be as under:—

Lectures 1 and 2.—In these lectures will be exhibited a concise view of the Proceedings in an Action at Law, from the issuing of the writ of summons down to final judgment and execution thereupon.

Lectures 3 and 4.—The Principles of Pleading considered; with some remarks upon the evidence necessary to support particular pleas; and an inquiry respecting the alterations in the

science of pleading effected by the Common Law Procedure Act, and by the Pleading Rules of Trinity Term, 1853.

Lectures 5 and 6.—The Fundamental Principles of the Law of Torts, or wrongs independent of Contract, examined and contrasted with those leading Rules by which the law of Contracts is governed.

Lecture 7.—Specification of the various Forms of Action *ex delicto*—Inquiry how far the Forms of Action have been effected by recent changes.

Lecture 8.—The Actions of Trespass, Trover, and on the Case considered, with reference more especially to the classes of facts out of which they ordinarily originate.

Lecture 9.—Ejectment—For what it lies—The mode of Procedure in this action.

With his private class the Reader proposes to follow out in detail the course of inquiry indicated by the above prospectus. He will examine the various steps in an Action at Law—the Rules of Pleading—and the nature of remedies *ex Delicto*, showing under what circumstances those remedies are respectively available. The books to be used with the private class will be the following:—The Common Law Procedure Act (Ed. by Holland); Stephen on Pleading; Selwyn's *Nisi Prius*; and Smith's *Leading Cases*.

The public lectures on Common Law during the ensuing term will be delivered, and the private classes will meet in the Hall of the Inner Temple as under:—

The public lecture on Monday in each week, at two p.m., the first lecture to be delivered on Monday, January 23rd.

The private class on Tuesday, Thursday, and Saturday in each week, from a quarter to twelve to a quarter to two o'clock.

“ LANDS, TENEMENTS, AND HEREDITAMENTS.”

The above words are in continual use by lawyers and students, and yet it is not too much to say that their precise meaning is but little apprehended, which may be partly accounted for by their being used indiscriminately, and applied together to subject-matters, so as to make sure of one of the expressions being applicable. Hence the common expression, that such or such a thing must be land, or a tenement, or an hereditament; and then the words are either used together, or the larger one is applied thereto, so as to save the trouble of fixing on the correct expression.

We shall have occasion, in our Analysis of, or Questions on, Preston on Estates, to notice that writer's views on the subject, and,

as a preparation thereto, we present a few remarks to the reader. The most elementary of our writers appear to have very confused ideas on the exact meanings to be attached to the above words. Thus we are told by Blackstone, that property is distributed into things real and things personal. This is a division peculiar to the law of England, though not very dissimilar to the one used in the civil law, namely, moveables and immoveables, and which, indeed, was used in our own law in former times, as appears from Glanville (lib. 10; cap. 6; lib. 7, cap. 16, 17). Things real, we are told, are such as are permanent, fixed, and immoveable, which cannot be carried out of their places, as lands and tenements: things personal are goods, money, and all other moveables which may attend the owner's person wherever he thinks proper to go (2 Black. Com. 16). And, again, the same learned author states that things real are usually said to consist in lands, tenements, or hereditaments. Tenement signifies, he adds, everything that may be holden, provided it be of a permanent nature; hereditament is by much the largest and most comprehensive expression, for it includes not only lands and tenements, *but whatsoever may be inherited*, be it corporeal or incorporeal, real, *personal*, or mixed (2 Black. Com. 17). Thus, then, we have it plainly stated that property is distributed into things which are either real or personal; that real property comprises lands, tenements, and hereditaments, and that the latter is of so extensive a nature, that though classed under things real, it comprises *both things real and personal*! Surely, it is not saying too much to assert that there is here a sad jumble and confusion of ideas, and it will be our task to endeavour to set the matter right. How came the expression "lands, tenements, and hereditaments," to be adopted in the English law? We cannot account for it, except that it is a corruption of a more expressive and correct expression. It will be observed that Blackstone (vol. ii. p. 16) says that the objects of property are *things*: now, how can an hereditament be called a *thing*? Land may be a thing, so may a tenement, but surely an hereditament is not; it is a word expressive of the quantity of estate which a person may have in a thing. It is a gross abuse then of language, and a confusion of logical terms, to class hereditaments with lands. In fact, instead of expressing a thing, it actually expresses a property or quality of a thing, namely, that something, as land, is transmissible to a man's heirs. We have said that we are not aware how the expression, "lands, tenements, and hereditaments," came to be introduced in our law; and certain it is that our old writers do not make use of it. Thus Glanville (lib. 10, c. 5) says, "*Quandoque res mobiles, ut cattalla * * quandoque res immobiles, ut terrae, tenementa, et redditus.*" This extract will also serve to show that the division of property was formerly into move-

ables and immoveables. It is observable that the only word used in the statute *De Donis* (13 Edw. 1, c. 1) is tenements. We conceive that the division of property into real and personal, and the former into lands, tenements, and hereditaments, is illogical, and without the warranty of our old writers. We trust to give an explanation that will not be without some authority in its favour, and which will be more logical than the one in common use. We find that Coke (1 Inst. 1 b (6), and see 6 a [n]) divides property into real, mixed, and personal. It is, indeed, true that he sometimes classes both lands and tenements as real property, whilst sometimes he classes tenements as mixed property. We also find that, by the erroneous sense in which hereditament is used, he has committed the absurdity of asserting that a man may have a fee-simple in an hereditament—in other words, an hereditament in an hereditament. Nothing can more forcibly illustrate the impropriety of the use of the word “hereditament” in juxtaposition with “lands and tenements.” Taking the hint from what Coke has stated, we think that property should be distinguished as being real, mixed, or personal. Under real we would place land and houses; under mixed, uses, estovers, commons, titles of dignities, &c.; under personal, money, goods, annuity, &c. We have now but to find proper terms to express the estate or interest which a person may have in those classes of property, and those we find already in use. They are inheritances (including thereunder, fees simple and fees tail), freehold (estates for life) and estates or interests less than freeholds (otherwise non-freeholds, otherwise chattels, that is, such an estate or interest as will go to a man’s executors). We may here observe that, in fact, lawyers have always used one of the terms in the same way as we now propose. We allude to “chattels real,” which is not properly applicable to distinguish the species of property, but to mark the quantity of estate in a thing real (see 1 Steph. Com. 156, note (a), 262; 2 *Id.* 65, 66). Thus, if a man have a term of years in lands, he is said to have a chattel real—that is, an interest in realty (lands) transmissible to his executors. It is true that the word “chattels” is used frequently as meaning goods, in particular by Coke (see 1 Inst. 118^b), yet he himself affords, in more than one instance, an antidote to his errors. Thus, at the page above quoted, he says, by the common law no estate of inheritance or freehold is comprehended under the words *bona* or *catalla*—that is, the word chattel is expressive of an estate which, being less, cannot, of course, comprehend the words *inheritance* or *freehold*. Without further detaining our readers, we may now state that the proper modes of expressing the species of property, and the estates which may be had therein, may be as follows;—A. may have an inheritance, a freehold, or a chattel interest in property *real* (as lands and houses),

mixed (as uses, commons, &c.), and *personal* (as money, annuities, &c.). An inheritance real may sound oddly, but it is strictly correct, as is the usual expression *chattel real*.

Our readers will, of course, please themselves about adopting this nomenclature; our only object has been to make them sensible that there is a deception about the terms in ordinary use, against which they will do well to guard themselves. If they bear this in mind, there will, perhaps, be no great harm in continuing to use the old expressions, which are, indeed, so engraven in the language of the law as to be ineradicable.

MOOT POINTS.

No. 40.—*Devise subject to Annuity—Sale of Lands.*

A., by his will, devised and bequeathed all his real estate unto B. and his heirs, subject to the payment of an annuity of £150 to C. Can B. sell the estate without the consent of the annuitant, C.?

SIGMA.

No. 41.—*Devise on attaining Twenty-one.*

A., by his will, gave, devised, and bequeathed all his real and personal estate unto his nephews and nieces, and their respective heirs, when they arrived at the age of twenty-one years. One of the nephews died before he was twenty-one, without leaving lawful issue. To whom will his share go, to his next of kin, or be divided amongst the other nephews and nieces of A.?

SIGMA.

No. 42.—*Devise over if die before becoming entitled.*

Testator by his will, dated the 19th August, 1842, gave all his real and personal estate unto his trustees, A. (his cousin), B., and C., upon trust, to receive and take the rents, profits, and proceeds of his said real and personal estate, and pay the same to his said testator's wife, or otherwise permit and suffer her, his said wife, to enjoy the same for and during the term of her natural life; and from and immediately after her decease, then for them, his said trustees, if he should leave any child him surviving, to stand possessed of his said personal estate, and the rents and profits of his said real estate, until the youngest of his, said testator's, children, if more than one, should attain the age of twenty-one years; and when and as soon as the youngest of his, said testator's, children, if more than one, should attain the age of twenty-one years, then he gave and devised to them, his said children, all the said trust estates, moneys, and pre-

misses, to hold to them, his said children, their heirs, executors, administrators, and assigns, in equal shares and proportions, as tenants in common; and if but one child, then to such only child, his or her heirs, executors, administrators, and assigns for ever; provided always, that in case he should leave no such issue as aforesaid, or such issue should die under the age of twenty-one years, without leaving lawful issue, then he gave, devised, and bequeathed all the said trust estates, moneys, and premises, unto his, said testator's, sister-in-law, and A. (his cousin), their heirs, executors, administrators, and assigns for ever absolutely, to take as tenants in common, and not as joint tenants. But in case his said sister-in-law should happen to depart this life before she should become entitled to such share of the said trust moneys, and premises, then he gave and devised the whole thereof unto his said trustee A., his heirs, executors, administrators, and assigns for ever. The widow died two years *after* said testator's sister-in-law, leaving no issue.

Are testator's sister-in-law's representatives and A. jointly, or is A. alone entitled to the property devised by the will? *Quis.*

No. 43.—*Law of Shipping—Collision at Sea.*

When a collision between two ships takes place at sea, and some amount of negligence is attributable to each side, some writers lay it down that the loss must be apportioned between the owners of the two ships; others, that each side must bear its own loss. Which is the correct opinion?

Vide "The Woodross Sims," 2 Dodson, 88, 85, and Sir W. Jones on Bailments, 4th edit. Appendix, p. 32.

LUCAS CORDES (Newport).

No. 44.—*Policy of Insurance—Deviation—Ship in Distress.*

Is a deviation from a ship's course, in order to succour a ship in distress, and tow her into the nearest port, such vessel being almost in a sinking state, such a deviation as would avoid a policy of insurance effected on the first-named ship?

LUCAS CORDES (Newport).

No. 45.—*Liability for Damage done by Man-of-War.*

Who is liable for damage done by a man-of-war to a merchant ship, by running her down, under circumstances which, as between two merchantmen, would have rendered the owners of the ship causing the collision liable for the damage done to the other ship?

LUCAS CORDES (Newport).

No. 46.—*Inns of Chancery.*

Can any of your readers inform me what is the constitution of the

several societies of Clifford's-inn, and the other inns of Chancery, how members are admitted, and generally what are their practical or theoretical uses ?

LUCAS CORDES (Newport).

No. 47.—Table-Moving—Pretended Satanic Agency.

The Rev. Mr. Dibdin, and several other clergymen, have lately convinced themselves, and a few of the more credulous of their disciples, that the table-moving and table-talking, of which we have lately heard so much, are the direct result of Satanic agency ; and, undismayed by this somewhat alarming discovery, they assert that they are enabled to have, and that they do have, constant and intelligible intercourse, through the medium of a table, if not with the Father of Evil himself, at any rate with certain lesser evil spirits.

Would an indictment lie against these gentlemen, under the 9 Geo. 2, c. 5, for pretending to use "witchcraft," which term, it is to be observed, is in legal acceptation equivalent to "intercourse with evil spirits ?" (Steph. Com. 3rd edit. vol. iv. p. 269.) The mooster apprehends it would.

LUCAS CORDES (Newport).

No. 48.—Master and Servant—Dismissal of Servant for Misconduct.

A domestic servant committed an act of misconduct of a nature sufficiently heinous to justify his master in dismissing him on the spot, without paying him any wages for services rendered by him since his last monthly pay day. Instead of doing so, the master, however, gave him a month's notice to leave, his real motive for so doing being, not to spare the servant, but to suit his own convenience, by giving him time to look out for another servant in place of the one dismissed. The servant's subsequent conduct, however, being most unsatisfactory, although he did not commit any such fresh act as would of itself have justified an immediate dismissal, the master, about a week afterwards, ordered him to leave his service on the following day, which he accordingly did.

Was the master justified in so doing, or did he, by giving the month's notice, waive his right of immediate dismissal, and what remedy, if any, has the servant ? *Quære*, also whether, under the above circumstances, the servant is not entitled to wages for the period of service which elapsed between the last periodical day of payment and the day on which the month's notice was given ?

LUCAS CORDES (Newport).

No. 49.—Accord and Satisfaction—Account Stated—Vingt-et-un.

A. owed B. £100 for goods sold and delivered. Things being in this state, they one evening sat down to play *vingt-et-un*. No money passed between them, but, after every hand, a deduction was made from, or an addition to, A.'s debt, according to the

amount he had won or lost on the preceding hand, and each of them then jotted down the balance for the time being in their respective pocket-books. They played for some time with varying success. A., however, having on the whole so much the best of the game, that, after some time, there was a balance in his favour of £10. Luck, however, subsequently turned, and on the conclusion of the game A. owed B. £15, as they both agreed, and he accordingly gave B. his I O U for that amount.

Can B. now recover anything from A., and if so, what?—and if not, under what plea can A. avail himself of the above circumstances?
 LUCAS CORDES (Newport).

No. 50.—*Master and Apprentice—Indenture of Apprenticeship.*

A young man duly served his apprenticeship with a coach-maker. At the expiration of his time his master refused to deliver over to him the indenture of apprenticeship, falsely alleging that he had lost it.

What is the apprentice's best remedy for the recovery of the indenture?—and, supposing it to have been *bona fide* lost, what would be his rights as against his late master?

LUCAS CORDES (Newport).

No. 51.—*Law of Evidence—Proof of Post-marks.*

Does a post-mark on a letter prove itself, or is it necessary to call a post-master, or a stamper at the post-office, to prove it?

Vide *Abbey v. Lill*, 5 Bing. 299; *Plumer's Case*, R. and R. C. C. 264; and *Cox and Lloyd's County Court Practice*, 6th edit. p. 372.

LUCAS CORDES (Newport).

No. 52.—*Trust Estate—Mortgage Deed.*

A., trustee for B., an infant, lends a portion of the trust-moneys on mortgage. Is it advisable to allow the trust to appear on the face of the deed? And if it does appear, would not the fact of its appearance oblige the purchasers, under the power of sale (if a sale takes place to recover the advanced money), to see to the application of the purchase money, notwithstanding a declaration to the contrary?

The mooter believes that such would be the case, and would feel, obliged to any gentleman who would bestow his particular attention on the point, as it is an important one. C. C. ELLIS (Ruthin).

No. 53.—*Promissory Note—Statute of Limitations.*

About four o'clock in the afternoon of the 24th January, 1848, A. grants B. his promissory note for £50, payable on demand; and on the 24th January, 1854, at eleven o'clock in the morning, B.

entered a plaint against A. in the county court for the amount of the note.

Was the plaint entered in time to save the statute of limitations?
C. C. ELLIS (Ruthin).

No. 54.—*Statute of Limitations.*

The landowners in the parish of L—— instruct B., an attorney, to proceed with the inclosure of the waste lands in the said parish. The inclosure business was not wholly completed for about eight years, and B. does not present his bill to the commissioners for some time after the close of the proceedings, or, rather, for a year after *his* part of the business was finished.

Could any part of B.'s bill be barred by the statute of limitations?
C. C. ELLIS (Ruthin).

No. 55.—*Negligence—Refusal to Pay Bill.*

A., a solicitor, is employed in the registration of the district of ——. During the business a mistake is made by one of his clerks in the dates of the objections to votes, which renders them all useless.

Can his employers, with any chance of success, refuse to pay his bill, on account of *gross negligence*? C. C. ELLIS (Ruthin).

No. 56.—*Retainer by Executor.*

A. dies, leaving the sum of £150, and no real property, devised by his will to pay his just debts. B. is his executor. B. has a *simple contract* debt of £100 against A., deceased. There are other *specialty* creditors to the amount of £80. B. retains his own debt—viz., £100—and hands over the remainder (£50) to the other creditors.

Is B. right in so doing? The mooter apprehends not, and that the specialty creditors can compel B. to discharge their demands first *in full* before he retained his own. C. C. ELLIS (Ruthin).

No. 57.—*Infant—Promissory Note.*

A., an infant, lends a small sum of money upon a promissory note, out of his own allowance, without the knowledge of his guardian.

Can A. sue, through his guardian, upon that note?
C. C. ELLIS (Ruthin).

No. 58.—*Guardian and Ward.*

A. is guardian to B., an infant. B. is stolen away by C. A. proceeds against C., and recovers damages to the amount of £100, which he appropriates to his own use.

Is A. justified in so doing? The mooter apprehends not, but that he must account for the damages so recovered to his ward (Hale on F. N. B. 139).

C. C. ELLIS (Ruthin).

No. 59.—*Attorney's Lien for Costs.*

A. employs B., a solicitor, in some business. He had never but once employed him before. A. refuses to pay B.'s bill. B. has in his hands certain papers and deeds belonging to A., which he had obtained possession of in consequence of having to make an abstract of them a short time previous.

Upon these he claims a lien. Is his claim a good one?

C. C. ELLIS (Ruthin).

No. 60.—*Lien.*

A. has a simple contract debt against B. of seven years' standing, so that of course it is barred by the statute of limitations. Can A. obtain payment of his demand through the medium of a lien which he holds on the property of the debtor? The mooter will contend that he can (*Higgins v. Scott*, 2 B. and Ad. 413).

C. C. ELLIS (Ruthin).

No. 61.—*Endangering Neighbour's Foundations.*

A. is entitled to a field, at the bottom of which is another field, containing a chalk-pit, which has been worked a considerable time—indeed, many years. The proprietors of the chalk-pit have dug so close to A.'s field that, although he wishes to build a wall at the bottom of his field, he cannot do so, the chalk being too loose to support it. Has A. any and what remedy?

E. J. H.

No. 62.—*Lien.*

A. sends a quantity of goods to the works of B. to be bleached; who thereupon bleaches and returns the same to A. A. sends a second quantity of goods to B. for the like purpose as the first, who, on receipt of the same, informs A. that before they can be bleached the charges for bleaching the first quantity must be paid.

In the event of A.'s refusal to pay those charges, can B. claim a lien upon the second quantity of goods remaining at his works unbleached for securing the payment of his charges for bleaching the first quantity of goods?

T. W. M.

No. 63.—*Liability of Retired Partners.*

In the year 1834, certain persons, trading under the firm of C—, W—, and Co., or the "L— Co-operative Association," purchased buildings, which were conveyed to A., B., C., and

D., in trust for the several members of the said firm, and their assigns, &c. Since then there hath been upwards of twenty persons who have been partners, and have gone out of the firm; and the remaining partners, being insolvent, assigned all their estate and effects, both real and personal (not including their private property), unto E. and F., their heirs, executors, administrators, and assigns, upon certain trusts therein mentioned. And as the assets of the remaining partners are insufficient to meet the demands of their creditors, cannot the persons who have gone out of the firm during the last twenty years be made to contribute equally towards the deficiency, along with the remaining partners? No deed of co-partnership was ever prepared, or any notice of dissolution given.

A SUBSCRIBER.

No. 64.—Barrister's Privilege from Arrest.

A barrister, as such, is not privileged from arrest merely because he is attending in the ordinary manner at the sessions (Newton, Esq., v. Constable, Bart., T. T. 1841, Q. B. F. J.)

Quære. Would he be privileged if *previously retained* to attend the sessions?

This is a point of great importance. I should be glad if any gentleman would point me to a more recent case upon the subject.

JUNYER.

No. 65.—Estate Tail—Conveyance not Enrolled.

A. by his will, made in 1786, gives a certain estate unto his nephew, P., and his assigns, for life; then to trustees, to preserve contingent remainders, with remainder to the use of P.'s eldest son, and his assigns, for life, with remainder to the use of the first and every son, and sons of the said P., the son, successively in tail male, with remainder, unto all and every the daughters, and daughter, of his said nephew, P., lawfully begotten or to be begotten, and the heirs of the body and bodies of such daughters, and daughter respectively, as tenants in common; and in default of such issue, to his own right heirs for ever.

The nephew left three sons, all of whom died bachelors, and three daughters, A., B., and C. A. married, and has since died, leaving a son and several other children. B. married, but had no lawful issue living at her death; and, prior to her death, she conveyed her one-third of the estate to her illegitimate son, but did not enrol the deed. C. is still living; and is married, and has several children living, the eldest of whom is of age. The three daughters, when living, were the right heirs of the testator.

Can the eldest son of A., and the illegitimate son of B. and C., and her husband, together with their eldest son, execute a good

conveyance to a purchaser, without enrolling the deed under the Abolition Act?

If any of your correspondents will favour me with an answer per post, I shall feel particularly obliged. J. BARNERN (Leek).

No. 66.—*Copyholds—Enrolment of Surrender.*

A. being seized in fee of a dwelling-house, and forty-six acres of land of copyhold tenure, held of the Manor of E——, surrendered the same, on the 26th of July, 1842, to B., in mortgage for securing £800 and interest; and on the 2nd of August, 1843, surrendered the same to C., in mortgage for securing £450, but subject to the prior mortgage to B. for £800. On the 6th of November, 1847, A. (in consideration of the £450 due to C., also in consideration of the further sum of £130 then due from A. to C., also in consideration of C. having agreed to comfortably maintain A. for life, and to pay to A. an annuity of £10 for life, and after A.'s decease to pay certain legacies, amounting to £100, bequeathed to certain persons by the will of A., then executed) surrendered the same copyholds to C., his heirs and assigns, for ever, subject to the mortgage to B. for £800.

Shortly before the 6th of November, 1847, the property was advertised for sale by auction, and there was an offer made for it, which would leave £411, after discharging the £800, £450, and £130, and which surplus of £411 would have purchased a handsome annuity for A., she being at that time nearly seventy years of age.

At the time of the transfer by A., in 1847, the premises realised a rental of £69 annually, and the annual out-goings at that period amounted to £58, leaving £11 as a surplus for the surrenderor, and to provide the definite annuity of £10, and the indefinite one of "a comfortable maintenance."

A. received the £10 regularly for several years, and lived with, and as a part of the family of, C., until two years ago, when A. left C.'s house, since which period A. has had much difficulty in obtaining money from C.

Was it necessary, under 53 Geo. 3, c. 141, to enrol the surrender of the 6th of November, 1847, in the Court of Chancery? And what effect has that surrender against the surrenderor?

J. J. HANDLEY (Mansfield).

ANSWERS TO MOOT POINTS.

No. 30.—*Bankruptcy—Trader* (antè, p. 160).

Cannan v. Smith appears to me to have been very properly decided. The exception in sect. 65 of the Consolidation Act extends only to companies established by charter, or by Act of Parliament, whilst the East of England Banking Company falls within neither of these clauses; but is a Joint Stock Banking Company, carrying on business under the provisions of the 9 Geo. 4, c. 46. The difference between a member of a trading corporation being made bankrupt as such, and a shareholder in a joint stock company being so made bankrupt, is manifestly very great, inasmuch as the individuality of the former is merged in the corporation at large, whilst the latter is actually and personally a member of a trading partnership, and therefore as much a trader as a partner in a private firm. I may mention, that several cases have lately occurred within my own knowledge, in which persons have been adjudged bankrupts, as shareholders in the Monmouthshire and Glamorganshire Joint Stock Banking Company, which was recently wound up in Chancery under the Winding-up Acts.

LUCAS CORDES (Newport).

No. 23.—*Tenancy in Common, or Joint Tenancy* (antè, p. 103).

I am much obliged to the gentlemen who have given this question their consideration, but I nevertheless retain my original opinion. The cases of *Rigden v. Vallier*, *Doe v. Vaughan*, and *Clayton v. Lowe*, cited by F. D., are all inapplicable to the present question; the first being a decision upon a limitation under the Statute of Uses, and the two latter upon limitations contained in wills, whilst ours is the case of a limitation by deed operating at common law, and for the same reason Junius's quotation from "Powell on Devises" is likewise irrelevant. Now, it is firmly settled, that many expressions which in a will or in a deed operating under the Statute of Uses, would suffice to create a tenancy in common, would, nevertheless, not have that effect if they occurred in a common law limitation, for the common law favoured a joint tenancy rather than a tenancy in common, because the divisible services issuing from the land (*e. g.* rent,) were not divided, nor the entire services (*e. g.* fealty,) multiplied by the former as they were by the latter. Accordingly, it was admitted by all the judges in *Fisher v. Wigg*, 1 P. Wms. 17; S.C. 1 Salk, 391; and was also decided in a case reported, 1 Eq. Ca. Abr. 291, that the words "equally to be divided" in a limitation at com-

mon law, are insufficient to turn what would otherwise be a joint tenancy into a tenancy in common; those words, as Lord Holt observed in the former of those cases, implying no more than that divisibility which the law has already annexed to an estate in joint tenancy. See also 1 Inst. 186, a; *Furse v. Weeks*, 2 Rolle, Abr. 91; and Burton's Compend., 7th edition, p. 50, which completely bear me out in the opinion I have expressed.

LUCAS CORDES (Newport).

No. 38.—*Settlement by Woman about to be Married (antè, p. 162).*

If a woman, during the course of a treaty of marriage with her, makes, without notice to the intended husband, a conveyance of any part of her property, such conveyance will be set aside in equity as a fraud upon the husband's marital right (*per* Lord Thurlow, L. C., in *Countess of Strathmore v. Bowes*, 1 Ves. 22; S.C. *White and Tudor's Equity*, L. C. i. 276-7). But if the husband had notice of the settlement prior to the marriage, he will be bound by it; for in such a case he has no deception to complain of, and *volenti non fit injuria*. (*St. George v. Wake*, 1 Mylne and Keen, 610; S.C. *White and Tudor's Equity*, L. C. i. 282). As the husband in the case under consideration had due notice of the settlement, it will therefore be binding upon him, and be as valid in all respects as if he had been a party to it. In connection with this subject, see also Macqueen on Husband and Wife, 35, 36; Story's Com. on Equity Jurispr. 2nd edition, i. 221; and 1 Fonbl. Eq. Tr. Lib. 1, c. 4, s. 11.

LUCAS CORDES (Newport).

No. 16.—*Lien—Innkeeper—Carriage (antè, p. 101).*

This question, besides being discussed in the case cited by the mooter, was also raised in *Smith v. Dearlove*, 17 Law Jour., C. P. 219, but it did not become necessary to decide that case on the merits. There can, however, I think, be no doubt but that the innkeeper has no lien upon the carriage. Mr. J. F. Crump has ingeniously shown at p. 169 *suprà*, that the innkeeper's lien on his guest's carriage is precisely similar to that upon his horse, and that he has no lien upon the horse for the guest's personal expenses, whence it follows as a necessary deduction that he has no lien upon the carriage for such expenses. The rule laid down in *Bac. Abr. "Inns,"* to the effect that the innkeeper has a lien upon the horse for the horse's charges only has been so strictly adhered to, that it has been ruled that if the guest brings several horses to the inn, each is a pledge for its own keep only, and not for that of the others (*Moss v. Townsend*, 1 Bulstr. 207; Addison on Contracts, 3rd edition, i. 486), *à fortiori*, it would not be a pledge for the keep of its owner, nor by parity of reasoning would the carriage. This, if

any doubt remained after Mr. Crump's argument, would, I think, suffice to settle the question.

LUCAS CORDES (Newport).

No. 32.—*Lessee of Mortgagor* (antè, p. 160).

Although the lease is void as against the mortgagee, who may eject the lessee without even giving him notice to quit (*Keech v. Hall*, Dougl. 21), yet it is binding as between the mortgagor and the lessee; the latter of whom is estopped from disputing his lessor's title, and "cannot throw off his relation to him without his consent" (*Burton's Compend*, 7th edition, 345-6). Although in the event of the mortgagee's giving him notice to pay the rent to him, he would be at liberty in answer to any action by the mortgagor, to confess the title of the latter, and avoid it by shewing it to have been determined by the notice. (*per Tindal, C. J.* in *Waddilove v. Barnett*, 4 Dowl. 348; and see also *Smith's L. C.* 1st edition, i. 316). If the lessee is ejected by the mortgagee, he of course has his remedy against the mortgagor upon the covenant for quiet enjoyment in the lease.

LUCAS CORDES (Newport).

No. 28.—*Tenancy in Common, or Joint Tenancy* (antè, p. 103).

I differ from Mr. Cordes on this point, and am of opinion that the grantees take as tenants in common. It has long been settled law that the words "equally to be divided between them," operate so as to create a tenancy in common whether in deed or will. (*Vide Anon.* 3 Vent. 365; *Fisher v. Wigg*, 1 Peere Williams, 41; *Rigden v. Vallier*, 2 Ves. 252).

HENRY REDDISH (Stockport).

No. 32.—*Lessee of Mortgagor* (p. 160).

The lease is *invalid* without the consent of the mortgagee. (See *Coote on the Law of Mortgage*, p. 409).

HENRY REDDISH.

No. 29.—*Distress for Rent—Set-off* (antè, p. 159).

I am of opinion that B. has no right of set-off in this case against the executor of A., inasmuch as the half-year's rent accrued, due to A. in the capacity of executor *after* the decease of his testator, and there being, at the decease of such testator no mutual debts due in the same right between him and B. If the rent had become due in the lifetime of the testator, then I apprehend the debts would have been mutual, and B.'s right of set-off against A. as executor would have come within the terms of 8 Geo. 2., c. 24, s. 4.

J. J. HANDLEY (Mansfield).

No. 34.—*Game* (antè, p. 160).

The 24th. section of the Game Laws Amendment Act, 1 & 2 W. 4, c. 32, makes it penal for any one to take out of the nest, or de-

stroy, or knowingly to have in his possession, the eggs of any wild duck, but the act makes no provisions whatever for wild ducks themselves; and, therefore, I am of opinion that wild ducks are not accounted game.

A. H. MORTON (Louth).

No. 32.—*Lessee of Mortgage* (ante, p. 160).

I think there can be no doubt, that the tenant can get clear of the lease in this case. For a lease made by a mortgagor without the consent of the mortgagee is absolutely void, and operates as a determination of the mortgagor's estate, and the mortgagee is under no necessity of giving the lessee six months' notice to quit, but may oust him at once.

W. R. W.

No. 14.—*Legacies—Deficiency of Undisposed of Personality* (ante, pp. 59, 110, 112, 162.)

I must confess, that immediately after I had read the opinion of W. T. P. on this important question, I saw that I must "amend the answer" which I gave to it in the same number of the *LAW STUDENTS' MAGAZINE*, but I deferred doing so, in order to consider the opinion of any subsequent writer on the point. The opinion which "Studens" expressed in the last number on the question, appeared to me so opposed to the case cited below on the subject, that I felt that it was high time to give my amended opinion.

"Studens" considers that the clause referring to payment of debts is simply inoperative, being, in fact, merely declaratory of what the law itself provides; "this being only a mere opinion, and not supported by any cases or authorities, cannot have much weight. I adhere to the first part of my opinion given at p. 110, so far as regards the bequest in favour of E. F., that assets will be marshalled in favour of pecuniary and specific legatees, where lands are made the primary fund for the payment of debts; but, I must admit, that the cases I there cited do not bear out this with respect to the present question. I have, however, met with the following case, which I consider greatly in point.

In *Choat v. Yeates* (1 Jac. and Walk. 102), a testatrix gave the residue of her funded property after payment of her just debts, legacies, funeral and testamentary expenses to A., and all the residue of her personal estate upon certain trusts: it was held that the funded property was primarily liable, though the effect was to leave nothing for the legatee. Mr. Jarman, in his treatise on Wills, vol. ii. p. 600, concludes from this case, "that in regard to personal property, the whole of which was antecedently applicable to debts, as additional security to the creditor could not be the object of the provision, the natural inference is, that the testator, in appropriating for this purpose a particular portion of that estate, intended that it should be primarily applied."

Thus it is in the present question. The testator gives all his freehold and chattel property to a trustee upon the following trusts: first, that he suffer testator's wife to take the rents thereof for life, and after her decease, *and after all his just debts and testamentary expenses are liquidated*, then he gives his dwelling-house, garden, and orchard to E. F. and his heirs for ever; and I consider the case of *Ohoat v. Yeates* very analogous to it, so far as respects the clause directing payment of debts and testamentary expenses; for the property is given to E. F. *after the liquidation of testator's debts and funeral expenses*.

After reading the answers of W. T. P. and "Studens," I have changed my opinion as to the leasehold property specifically bequeathed to the nieces being marshalled in favour of the pecuniary legatees, because such property does not seem to have been charged by the testator with the payment of debts, as in the case of the property bequeathed to the nephew E. F., and inasmuch as it is a perfectly distinct bequest.

Presuming, therefore, as I have endeavoured to show, that the leasehold property bequeathed to the nephew was made the primary fund for the payment of debts, I think the executor wrong in paying the funeral expenses out of the proceeds arising from the sale of the furniture, &c.; but as such has been the case, it is my opinion that the pecuniary legatees will be allowed to come upon the leasehold property bequeathed to the nephew, to the amount which the sale of the furniture and chattels realised.

HENRY MURRAY (Oldham).

No. 29.—*Distress for Rent—Set-off* (anté, p. 159).

I beg to refer F. T. D. to Woodfall's Land. and Ten., 6th edit. p. 330, where it is stated, that a tenant having a cross debt due to him by his landlord will not prevent the latter from distraining.

HENRY MURRAY (Oldham).

No. 29.—*Distress for Rent—Set-off* (anté, p. 159).

The principle upon which a set-off is allowed to be pleaded is, that the demands should be mutual, and due in the same right. In the case mooted, B.'s rent did not become due until after A.'s death and, consequently, would be recoverable by A.'s executors in their *individual characters*; and, therefore, B. would be prevented from making a set-off against A. The doctrine of set-off is well explained in *Lambarde v. Older*, 17 Jur. 1110, and referred to in the *MAGAZINE* for February, p. 71. Besides, where the remedies to recover the cross demands are not the same, as in this case, viz.—the rent by distress, and B.'s claim by an action at law, the latter could not be specially pleaded, and the party making the distress would not, in

my opinion, be bound to take notice of the set-off; but would sell for the whole amount of rent due in obedience to his warrant, and, therefore, B. can be in no better position than an ordinary creditor.

W. W. CHARLES.

No. 39.—*Dower—Reconveyance* (*anti*, p. 182).

This is an important question, and though I have not been able to find any authorities bearing on the point, I am inclined to think that C., the Dower trustee, having joined in the mortgage to E., thereby conveyed away the whole of his estate, and consequently he ceased to have any further interest in the property, and his former estate would not again revive until it was reconveyed to him as trustee to bar Dower; and the reconveyance having been made to B. alone, without any limitations to Dower uses, it appears to me to admit of very little doubt, but that the widow's right to Dower will attach on the estate being reconveyed to B., as proposed. But why should the Dower trustee be made a party to the mortgage, I do not understand? It does not appear to me to have been necessary; it is not even necessary to make him a party to a conveyance to a purchaser, as the Dower trustee has no interest or estate in the property until the determination of B.'s estate in his lifetime by forfeiture or otherwise; and if so, the difficulty suggested would not have occurred. I beg to add that the above remarks are deferentially offered.

W. W. CHARLES.

DEBATING SOCIETIES.

LAW STUDENTS' MUTUAL CORRESPONDING SOCIETY.

(*Head Office, St. Giles-street, Norwich.*)

MOOT POINTS IN COURSE OF DISCUSSION.

No. 58. A., B., and C. are solicitors carrying on a partnership business. A. is appointed trustee of the will of D., a client. Would the firm be allowed to charge the trust for business transacted by them in a professional capacity, and A. thus make an indirect profit by virtue of his trusteeship, and if not, would a special proviso inserted in the will authorising A. to charge make any difference?

No. 59. A. bequeaths personalty to B. and his children, *and in case all the children die under twenty-one*, gift over to C. B. died unmarried. Does the gift over take effect?

No. 61. In an action in the new County Court, is a defendant

entitled to have a debt due to him from plaintiff inquired into and set off against plaintiff's claim. (due notice having been given), supposing the debt sought to be set-off was contracted and the goods delivered out of the jurisdiction of the court?

No. 64. A trustee for sale of copyholds being steward of the manor of which such copyholds form part, can he surrender the copyholds to himself as steward without working a merger, or would the appointment of a deputy or the taking of the surrender by the lord be the proper course?

No. 67. C., by deed, demises a farm of land to D. for a term of thirty years at an annual rent of £150. The rent runs in arrear for eight years. Can the landlord distrain for more than six years' arrears?

No. 69. A testator gave certain real estates to his wife for life, with remainder to his daughter, but in case she should die before she became "entitled," then to testator's son. The daughter outlived the testator, but died previous to the mother, leaving issue. The mother is recently dead, leaving her son in remainder surviving. Does the issue of the daughter or the son in remainder take the estate?

No. 71. Can a mortgagee in fee, who was paid off in 1849, but in whom the legal estate is now outstanding, execute a good transfer (by the direction of the mortgagor) upon the trusts contained in the mortgage, and could such a course be objected to by a purchaser in the event of a sale by the transferee under such trusts?

No. 73. A., the owner of certain premises, enters into partnership with B. and C. as soap manufacturers. A. finds the capital for the purpose of fitting up the necessary machinery, plant, and fixtures on the said premises, as well as for the purpose of manufacturing soap. A. subsequently mortgages the premises, including all machinery, plant, fixtures, &c., to D., the other partners not joining in the assignment of the chattels, to raise money to improve and increase the machinery as well as to carry on the business. A., B., and C. are afterwards made bankrupts. Who is entitled to the machinery and fixtures? Can D. sell them under the powers of sale contained in his deed, or do they pass to the assignees for the benefit of the creditors generally.

No. 74. An assignment was made by A. for the benefit of his creditors. At the time it was made an action was pending against A. in the County Court, and judgment was obtained against him a day or two after the assignment and execution issued. When the bailiff entered A.'s house he found no one in possession of the furniture &c., under the assignment, but was informed by A. an assignment had been made. The execution creditor disputes the validity of the assignment. *Quære.* Is not the non-taking possession of A.'s goods

and chattels but the suffering them to remain in his apparent ownership a badge of fraud so as to render the assignment void as against the execution creditor under 13 Eliz. c. 3.

No. 76. In a declaration of trust of a sum of settled stock for charitable purposes the power of appointing a new trustee in the event of the death of either is given to the continuing trustee jointly with the executor of the deceased trustee. A., one of the trustees, is dead, having appointed his son B. his executor, who it is wished by C., the continuing trustee, should if possible be appointed the trustee of the fund in the stead of his father. Can B. be appointed a new trustee by an execution of the power by himself and C., the surviving trustee? CHARLES R. GILMAN, Hon. Secretary.

Norwich, 11th March, 1854.

LONDON LAW STUDENTS' DEBATING SOCIETY,

(At the Law Institution. Chancery-lane.)

QUESTIONS FOR DISCUSSION.

April 4th, No. 73. Is the Government Reform Bill a beneficial measure? — Adjourned from March 7th, on the motion of Mr. Blagg, seconded by Mr. Hindley.

April 11th, No. 120. A testator, who died in 1816, devised his real estate to A. for life, with remainder to B. in fee, and charged it with a rent-charge of £1,000 per annum to C. for life. A died in 1848, on a day between the half-yearly days on which the rents of the estate, and also the rent-charge, were payable. The remainderman has received the full half-year's rent, which became due shortly after A.'s death, but it is admitted that such rent is under 2 Geo. 2, c. 19, apportionable between A.'s executor's and B. Is the rent-charge also apportionable? (*Sutton v. Chaplain*, 10 Ves. 66). Affirmative—Mr. Flux and Mr. Talbot. Negative—Mr. Elgood and Mr. Dickens.

April 25th, No. 121. One partner of a firm, who hold a joint mortgage to secure a partnership loan, becomes accessory in his individual character, and without the knowledge of his co-partners, to an advance by a third person upon the same security, and conceals the prior charge. Is the first mortgage postponed to the second? (see *Mocatta v. Murgatroyd*, 1 P. W. 393). Affirmative—Mr. Girdlestone and Mr. Emanuel. Negative—Mr. Perry and Mr. J. W. Smith.

W. C. BOMPAS, Secretary.

19, Coleman-street.

BIRMINGHAM LAW STUDENTS' SOCIETY,

At a meeting on the 1st of February, 1854, the following moot point was discussed:—

"A mortgage is made to A. and B., in which is a recital that the money is advanced on a joint account, and the proviso for redemption is on payment to them, *or the survivor of them, his executors, &c.* The power of sale is limited in the same way. A. dies without executing the deed. Is A.'s executor a necessary party to a re-conveyance of the mortgaged property?"

It was admitted on both sides that where a mortgage is made to two or more persons, in the ordinary way, they will be considered at law as joint tenants of the mortgaged property and the mortgage debt; but that *equity* will presume that a tenancy in common of the money was intended, and that whether the mortgage money was advanced in equal or unequal proportions. In equity, therefore, the survivor of two mortgagees is considered to be a trustee for the representatives of the deceased for the proportion of the mortgage money advanced by the deceased, and like every other trustee cannot give a good discharge in equity, without a power expressed or implied, or the concurrence of the persons beneficially interested. The question sought to be settled by the discussion was, what would be sufficient to rebut the presumption which equity makes in such a case that a tenancy in common was intended, and to establish a joint tenancy in equity as well as at law? All the text writers and books of precedents state that the proper practice is to declare that the money is advanced on a joint account, and that the receipt of the survivor shall be a good discharge. It is clear, if the last clause be inserted, it does not matter to any person taking title under the surviving mortgagee whether he is trustee or not, since, if he be a trustee, he has an express power of giving receipts. There appears to be an entire absence of authority as to whether anything less explicit than this form would suffice; and it was thought that where, as in the case put, the mortgage deed expressly provided for payment of the money to the survivor, and the exercise of the power of sale by him (which would be unnecessary in a legal point of view), that these expressions, coupled with the declaration that the money was advanced on a joint account, would be sufficient to rebut the presumption that a tenancy in common was intended. In support of this view, which was adopted by the meeting, much stress was laid upon the fact that where the mortgage deed discloses that the money was advanced by the mortgagees as trustees, courts of equity hold them to be joint tenants of the money. The few cases on the subject will be found cited in Coote Mortg., p. 510.

Another question of great importance—a question which may arise, whatever be the form of the mortgage deed—was raised: viz., whether the execution of the mortgagees is necessary to the validity of a declaration as to the mortgage money. From Com. Dig. Fait, C. 2, and Co. Litt., 230, b., it would appear that a person named

as a party in an indenture, and taking an estate thereunder, is bound by the contents. (See *Webb v. Spicer*, 13 Q. B., 893). On the other hand, in *Doe v. Shelton*, 3 A. and E., 283, it was held that the defendant was not bound by a recital of a particular fact contained in a deed conveying an estate to him, although he had adopted the deed by conveying the estate to another person. This second deed contained no recital of the fact, and the court held that as the defendant did not execute the deed containing the recital, although he adopted it, there was no direct estoppel. See also *Com. Dig. Fait*, A. 2, where it is said that, "regularly, a deed is not the deed of him who has not sealed it." No decision was arrived at on this part of the subject, it being resolved, at some future time, to discuss the general question, how far a person is estopped by recitals in a deed under which he takes an estate, but which he does not execute.

G. J. JOHNSON, Cor. Sec., *pro tem*.

At a meeting on the 15th February, 1854, the following moot point was discussed:—

"Is a written acknowledgment of a debt, given by the debtor to a third person, sufficient within the 9 Geo. 4, c. 14?—and can a written acknowledgment, given by the maker to the payee of a promissory note, be made available to defeat the Statute of Limitations in an action by a subsequent party to the note?"

By 21 Jac. 1, c. 16, all actions of debt upon simple contract must be commenced within six years after the cause of action accrues. The 9 Geo. 4, c. 14, further requires that any acknowledgment or promise to take a debt out of the statute of James, shall be in writing, and signed by the party chargeable thereby. The latter statute does not alter the nature of the requisite acknowledgment or promise (*Haydon v. Williams*, 7 Bing.), but only requires that it be signed by the *debtor himself* (*Hyde v. Johnson*, 2 N. C. 777). It is, however, silent as to *whom* the acknowledgment or promise may be made; and this question can only be settled by considering how and why an acknowledgment or promise takes a debt out of the statute. Previous to the case of *Tanner v. Smart*, 6 B. and C. 603, the decisions generally went upon the principle that the effect of the statute was to establish a presumption of law that all debts six years old were satisfied, and that, therefore, any admission of the existence of a debt, although coupled with expressions of disability or refusal to pay, rebutted that presumption, and took the debt out of the statute. As, therefore, an acknowledgment was looked upon not as giving a new cause of action (per Bayley, B. in 2 B. and C. 825), but as admitting the continuance of the old one, there was no reason why such an acknowledgment should not be received, although made to a stranger. By *Tanner v. Smart* (which has been confirmed by

all subsequent decisions), a new construction was placed upon the statute of James, and it is settled that the effect of an acknowledgment or promise is not to keep alive the old cause of action, but to create a new one, for the creation of which the old liability, although barred, is a good consideration. As was said by Rolfe, B. in *Hart v. Prendergast*, 14 M. and W. 741, there must be a new promise, and, from a general unqualified acknowledgment, the law implies a promise. But where the debtor, although admitting the debt, refuses to pay, *expressum facit cessare tacitum*—no promise can be implied—the old cause of action is barred by the statute, and no new one is raised.

It being then determined that the effect of an acknowledgment or promise, or, as it may be put, of the implied or express promise, is to give a new cause of action, it is clear upon principle that such cause of action cannot be given to any one but the person who is to sue thereon, and from whom alone the consideration moves. Accordingly we find that, although there are many cases before *Tanner v. Smart*, in which acknowledgments to third persons were held to bar the statute, there is *no such case since*, and the *dictum* of Baron Alderson, in *Greenfield v. Girdlestone*, 2 Y. and C., 662, is in the negative.

Although the principle has not yet been decided to apply to the case of a promise by one party to a promissory note, on which promise another person than the promisee sues (*Cripps v. Davis*, 12 M. and W. 159), yet it would seem equally applicable. For admitting, what is by no means certain, that such a promise attaches itself to the instrument, and is transferred with it, yet the note, and the cause of action thereby given, is barred by the statute; and if the plaintiff recovers at all, he will recover on a new cause of action, for which, no doubt, the extinct liability on the note was the consideration, but which is now totally independent of the note, and can only accrue to the benefit of the person to whom it was given. Both questions were decided in the negative.

G. J. JOHNSON, Cor. Sec. *pro tem*.

MUTUAL CORRESPONDENCE.

The only additions we have to report to the lists published *antè*, pp. 15, 16, 75, 136, are the following:—Mr. W. W. Charles, at *Rapert Clarke's*, Esq., Reading; Mr. W. Leonard, at *R. Leonard's*, jun., Esq., Bristol; Mr. A. H. Norton, at *F. Sharpley's*, Esq., Louth, Lincolnshire; Mr. T. H. Shacklock, Toothill, Mansfield.

POWER OF APPOINTMENT—TITLE UNDER.

Power to Appoint by Will among Children and Issue—In default of Appointment, Estate to go over to third parties—Appointment to Trustees upon Trust to Sell; but until Sale, to pay the Rents to the Children, and after to pay proceeds—Can the Trustees alone make a good Title?

[We purpose occasionally to notice some points occurring in actual practice in our own chambers, as well as those of some of our friends at the Bar, particularly in conveyancing matters. We think this must be useful to our subscribers, inasmuch as it will give them an idea of the kind of business to be met with in practice, and at the same time afford some practical information. Indeed, we know no kind of knowledge so useful as that acquired in chambers, both from its being such as is required in every-day practice, and as leading to a thoroughness of study not likely to be pursued where the student has no particular object in view. To read is, of course, an indispensable requisite for a lawyer, but this will be pretty nearly useless if not accompanied with, or followed by, practical application. There can be little doubt that our text-books would be much more useful if written by men of great practical experience; but, of course, this rarely is the case, as the practice of the law is much more profitable (in a *pecuniary* sense) than the writing and publishing of treatises thereon. The effect of the conjunction of actual practical experience and mere book-learning may be seen in the works of Mr. Preston, Mr. Hayes, Mr. Jarman, and a few others. In the matters we propose to place before our readers, we shall occasionally enter into such explanations as may be of assistance to the junior student. Of course, in giving our cases and opinions, we shall not give the real names of the parties or the counsel, and shall take care that nothing is inserted but what may, without impropriety, be published to the world.—Eds.]

A. B., by his will, devised his real estates to his wife and her heirs, on condition that she should, by her will, duly executed, give or appoint the same to his, the said testator's, children, or such one or more of them, and to their, his, or her issue, in such shares as she should in her discretion think fit, it being thereby declared that the wife should have the sole power of disposition to and among the said children and their issue; and the testator directed that in default of such appointment, the estate should go, and he thereby devised the same, to his children living at the decease of his said wife and their heirs, as tenants in common.

The widow of the testator afterwards, by her will, purporting to be made in pursuance and in execution of all the powers enabling her in that behalf, devised the said real estates to a trustee (who was also appointed executor) and his heirs in trust, at his discretion to sell the same. Until the sale, the trustees were to pay and divide the rents in certain proportions among the sons of the testator absolutely, and also among the daughters, for life, for their separate use, and on their respective deaths, between their respective children absolutely; and after the sale, the purchase money was given to and among the children in the same manner.

The trustee put up the estate for sale, and by the conditions, after stating that the sale was made by a trustee for sale under a will, it was stipulated that the purchaser should not require the *cestuis que trust* to join in the conveyance, but should accept a conveyance from the trustee alone.

The purchaser's counsel not being satisfied with the title, wrote the following opinion:—"I am of opinion that it would not be prudent for the purchaser to take a conveyance from the present vendor *alone*, for it is very doubtful whether the appointment was a good execution of the power. I am rather inclined to think that it might, notwithstanding many difficulties in the way, be held in equity to be a *substantial* performance of the power, but it is too arguable, not to say doubtful, a point for the purchaser to run the risk. In addition, even admitting (which, however, is not quite clear) that the case of *Thornton v. Bright* (2 Myl. and Cr. 230) has settled that, under a general power to appoint to children, an appointment to trustees is in equity a good execution of the power over a legal estate; yet it is to be observed that there cannot be a doubt that *at law* such an appointment must be bad; and it is, therefore, difficult to see how the legal estate can be in the vendor. Strictly speaking, this would necessitate the joining of all the *cestuis que trust* under the appointment (supposing it to be valid), but I think the purchaser need not insist on this.

However, if the parties to take in default of appointment, or their representatives (including the heir-at-law of the testator), will join in the conveyance, the purchaser may, on the other requisitions being satisfactorily answered, safely complete.—W. H."

The vendor, who appears to have before consulted counsel, probably with a view to framing proper conditions of sale, obtained the following opinion from his counsel:—"Some doubt may, as stated in my former opinion, be entertained whether the will of the widow was a due exercise of the power of devising the estate among the testator's children and issue, and whether she could give the executor, under her will, a power of sale over the property. But upon full consideration of the point, and after reference to the authorities,

I am of opinion that the power, though not duly exercised at law, would be held to have been duly exercised in equity (see *Kenworthy v. Bate*, 6 Ves. 796; *Bullock v. Fladgate*, 1 Ves. and Beam. 471, 478; *Standen v. Standen*, 2 Ves., jun., 589; see also *Wyham v. Wyham*, 18 Ves. 395); and that the vendor can compel the purchaser to accept the title and a conveyance from the trustee of the widow's will without the concurrence of the heir-at-law and persons entitled in default of appointment.—E. Y."

The opinions of the two counsel, though in accordance as to the point of the execution of the power, being so opposed as to the practical result thereof, a case, with the two opinions, was laid before an eminent Queen's counsel for his opinion. He wrote as follows:—"I am of opinion that the will of the widow is a due execution in equity of the power of appointment in question (*Kenworthy v. Bate*, 6 Ves. 793, and *Thornton v. Bright*, 2 My. and Craig, 230). But it is an invalid appointment at law. So that the real question is whether the surviving trustee can, by himself, confer the whole legal and equitable estate, or is relieved from that ordinary obligation by the special terms of this contract. I think the 8th condition does not relieve him from this common duty. That condition will not be construed as conveying sufficient notice that the legal estate was not in the trustee, or that the purchaser was not to have the legal estate unless the trustee could convey it. I am also disposed to think that the trustee has not the legal estate, or if he has that it is liable to be defeated by the entry of the testator's heir for condition broken. If the trustee has not the legal estate, it will probably be held to be vested in those who, under the testator's will, are to take in default of appointment. I am therefore of opinion that a court of equity would not compel the purchaser (under the conditions of sale referred to) to complete his purchase, and to take a conveyance from the trustee for sale under the widow's will without making parties the persons entitled in default of appointment, and probably the heir at law of the testator.—E. J. L."

It will be observed that the last counsel, and also the vendor's counsel, though he appears formerly to have been less decided, were of opinion that the power was well executed in equity. The purchaser's counsel has expressed himself with more caution, and probably not without reason. The power was (in effect) to appoint to and amongst the children and their issue, without any mention of the extent of the estate to be taken by them, if the words, "their issue" were not a limitation. On this point the case of *exp. Williams* (1 Jacob and Walker, 89) is in favour of the opinion that the execution was good in equity. There a devise of real estate (which, however, was afterwards sold under the compulsory clauses of an improvement act) was made to the testator's widow for life, to be by

her divided amongst such of the testator's children, and their issue, as should be living at the widow's death. The widow appointed the produce of the compulsory sale amongst such of the children of her deceased husband, and their issue, as should be surviving at the time of her death, in the manner and in the proportion following, *vis.*—to A. W. (a son), or in case of his death to his surviving children, equally to be divided between them, the sum of £150; and in the same manner a like sum of £150 each to the other children, or in case of their deaths to their surviving children respectively; and she also appointed a share to the children of a deceased child of the testator. It was objected that as the power was to appoint among the children and their issue, it must have been meant that the issue were to take jointly with their parents, and that an appointment in the alternative could not be justified. Also, that as the children and their issue were to take jointly, the appointment to the issue of the deceased child could not be good, for the children could not take at all when the parent was dead.

The Master of the Rolls (Sir T. Plumer) said, "The fallacy lies in taking the words 'children and their issue,' to denote the manner in which the estate is to be given, instead of the persons to whom it is to be given. All are equally objects of the power, and it might be executed in favour of any of them. The children and their issue are enumerated as the persons amongst whom the widow was to dispose of the estate."

Some of our readers may feel a difficulty as to the appointment of the proceeds of the sale being good, as the power was to appoint the estate. As to this we may observe, that it is established that such a power includes a power to sell, so as to enable the donee to give the proceeds, instead of the lands, *in specie*. In the case of *Roberts v. Dixall* (2 Eq. Cas. Abr. 668), Lord Hardwicke said, "It was admitted that the father (who had a power to appoint and divide the estate) might have appointed part of the estate to be sold and the money raised by such sale." And in *Kenworthy v. Bate* (6 Vesey, 793), where the parent had an exclusive power of appointing the estate to any of his children, and he gave the estate to trustees to sell and divide the money amongst the children, the Master of the Rolls held that, as it had been determined in *Long v. Long* (5 Vesey, 445), that a power to charge includes a power to sell, it followed that a power to give the fee simple of land included a power to sell, for the purpose of giving the money instead of the land.

As to the point raised by the purchaser's counsel, that the appointment did not give the trustee the legal estate, we have been favoured with the following note of an opinion of counsel on a case somewhat similar to the above: "When a power of appointing among specific objects is given, an appointment to a trustee for such

objects is of doubtful character as regards the right of such a trustee or of parties dealing with him. If it had been to appoint "in such manner and form," &c., the appointment might have been good (see *Trollope v. Linton*, 1 Sim. and Stu. 577; *Thornton v. Bright*, 2 Myl. and Cr. 230; *Limbird v. Grote*, 1 Myl. and Ke. 1; 3 *Preston on Abstracts*, 243). In a note to 12 Simons, p. , it is said that on a power to appoint to children, an appointment to a stranger in trust for the children would, in construction of law, be an appointment to the child, so that the nomination of the stranger as a trustee would be rejected." We have not been able to find this reference in 12 Sim. or elsewhere, but probably there may be such a note in one of the reports.

With respect to the case of *Thornton v. Bright*, so often referred to in the above opinions, we may observe that in the court below it was held that the rule which established the validity of a gift to *trustees* for the separate use of a married daughter, under a general power to appoint to children, was confined to *personalty*, and did not apply to *real* estate, but on appeal to the Lord Chancellor the decision was reversed (2 Myl. and Cr. 230), and the rule was held to apply as well to real as to personal estate, and to a legal as well as to an equitable estate (see 2 *Sugden on Powers*, 276, 277, 7th ed.). The L.C. said: "The argument assumes that under such a power [viz., to appoint in favour of children for such estate and estates charged with such annual or gross sums, and in such manner and form as he should think fit] the donee could not for any purpose create a trust. [The appointment, so far as objected to, was of the rents of the estate to a trustee for the separate use of a married woman.] * * The objection, therefore, is not that the appointment is not within the terms of the power, but that such a power, to be exercised over land, including the legal estate as well as the beneficial interest, must be confined to creating a legal estate, and cannot create a trust. * * *Alexander v. Alexander* (2 Ves. sen. 640) establishes that under a power to appoint a *personal* fund in such proportion as the donee should direct, an appointment to one of the objects for life, to her *separate* use, was good. * * The case of *Hervey v. Hervey* (1 Atk. 561) where Lord Hardwicke held that a power to jointure was a power to create a legal estate, and was not well executed by creating a trust, but he nevertheless considered the wife as entitled to her jointure, and decreed accordingly, is no authority to show that such a power as is found in this case cannot be executed by creating a trust; but it does prove that where there was at law a failure in the execution of the power, this court gave to the object of it, being a wife, the full benefit of it. * * It was contended, however, that the rule does not apply to *lands*, at least when the subject of the power is a legal estate in lands. No

case was cited in support of this proposition : against it there are several. The first of these is *Pitt v. Jackson* (2 Brown's C. C. 51). * * In *Crompe v. Barrow* (4 Vesey. 681) the subject of the power was leasehold property in trust. It is, however, an authority that an appointment to the separate use of a married woman is a good appointment under a less extensive power than this. The appointment in *Kenworthy v. Bate* (supra) where the power was over a legal estate in land, was supported upon the authority of *Long v. Long* (5 Ves. 445), *Thwaytes v. Dye* (2 Vern. 80), and *Roberts v. Dixall* (1 Atk. 607 ; 2 Eq. Cas. Abr. 668). How, then, can it be contended that such a power as this over a legal estate in lands can only be executed by creating legal estates ? If the contrary be the law, where then is the difference between such appointments over personalty and over land, and what is the ground of the difference which this decree establishes ? The cases of *Bennet v. Davis* (2 P. Will. 316) and *Doe v. Martin* (4 Term Rep. 64) were cited to prove that if there were any objection in the appointment to trustees, the wife's right would be the same in equity ; but in my view of the case it is not necessary to resort to that ground." In the supplement to Mr. Chance's work on Powers, we find the following : The question whether, under a power to appoint real estate to children, an appointment can be made to trustees, in trust for them, was a good deal discussed in *Thornton v. Bright*. There freehold estates in Ireland were settled (subject to prior life interests) "to the use" of all, or such of the children of a marriage, for such "estates," &c., "and in such manner and form" as the father should appoint. By his will he appointed two-thirds of the estate "to the use of [*trustees*] and their heirs" upon certain trusts for his two surviving daughters, including a trust for the separate use of one who was married, and who afterwards was the only survivor, and the L.C. held that the power was well exercised, and that, as it would appear, *at law*. The limitation to the trustees seems not to have been expressly confined to the lives of the daughters. The appointment contained ulterior limitations, upon which there was no final decision ; but as to some, at least, of which, it was admitted there was an excess. The words in the power "to the use" of the children seem to have been taken—not in their strictly technical signification as now commonly used in the limitations of freehold estates, but according to their original meaning—"for the benefit" of the children, and the words "in such manner and form" were relied on." It will be seen that Mr. Chance considers the power to have been well exercised at law ; but this is very doubtful, and it is to be observed that the three counsel in the above case agree in regarding the appointment as *not* being valid at law, but only good in equity.

CORRESPONDENCE.

Littleton's Tenures—Doctrine of Remitter.

GENTLEMEN,—In reading your excellent edition of *Littleton's Tenures*, I have encountered the following difficulty, which perhaps you will do me the favour of elucidating. Littleton says, sect. 664, "If tenant in tail enfeoff his heir apparent, the heir being of full age at the time of the feoffment and after tenant in tail dieth, this is no remitter to the heir, because it was his folly that being of full age he would take such feoffment. But such folly cannot be adjudged in the heir being within age at the time of the feoffment." In accordance with the doctrine you say (note to sect. 659, p. 114), "there is no remitter where he who comes to the defeasible estate comes to it by his own act or his own assent whilst under no disability. Hence the defeasible estate, to entitle the party to be remitted, must be made to him during infancy or coverture, or must come to him by descent or act of law." So far everything is perfectly intelligible, but a little further on, you say (p. 115), that the case of *Doe dem. Daniel v. Woodroffe* decided "that a person entering under an instrument which operates under the Statute of Uses, or a deed to which he is a consenting party, is, nevertheless, capable of being remitted to any more ancient title that he may have." The sentence in italics appears to me directly contradictory of the two former quotations. Am I to understand, that at the present day there is no remitter, where the person taking the defeasible estate takes it under a deed to which he, whilst under no disability was a consenting party, or that in such case he would still be remitted to his older and better title? If the former be the case it would seem that sect. 664. of Littleton has been overruled, and is not now law, and that your first assertion is erroneous; if the latter, then *Doe dem. Daniel v. Woodroffe*, (or your statement of it) is incorrect.

In Sheppard's Touchstone, p. 156 (6th edit. by Hilliard), it is said that "if tenant in tail make a feoffment in fee on condition, and dieth, and the issue in tail within age doth enter for the condition broken, in this case he shall be in first as tenant in fee simple, and heir to his father, and then shall be presently remitted; but if he shall be of full age he shall not be remitted;" and the reason given for the latter proposition in a note subjoined to this passage is, "because he might have had his formed on against the feoffee, and the entry for the condition is his own act," thus countenancing Littleton's doctrine, that a person taking the defeasible estate by his own act or assent is not remitted. See also, Co. Litt. 202, b, and 347, b.

The only difficulty, then, consists in *Doe dem. Daniel v. Woodroffe*, as stated by you at p. 115, and as to this I may mention that I have very carefully perused both the Law Journal report, and that by Meeson and Welsby of this case when before the Court of Exchequer, and the abridgment contained in the Law Journal Digest for 1845-50 of the same case when before the House of Lords on appeal; but can discover nothing to warrant your deduction from it; and, indeed, in that case the party remitted, so far from obtaining the lesser estate by his own act or assent, derived his title to it under a will. Lord Cranworth (then Rolfe, B.) certainly said, that "where a party in possession of land under a defeasible title acquires a right to assert an older and better title, not by action, but by entry" (or as Littleton has it, sect. 693, where his entry under the defeasible title is *congeable*), "then, the circumstance of his having acquired the *possession* by his own voluntary act, will not prevent the application of the doctrine of remitter" (10 Mee. and Wels. 633a, S. C. 12 Law Journ. N.S. Exch. 159); but this is obviously a very different thing to the case of a person acquiring the defeasible estate itself by a deed to which he is a consenting party; and Littleton expressly excepts the case of such estate being taken by deed indented, in which case he says there is no remitter (sect. 693). It is to be observed, also, that in the instance cited from *Shep. Touch.*, the son's entry was not *congeable*, for the feoffment, having then a tortious operation, worked a discontinuance, and the son had no right of entry under the entail, but a right of action only. It is, however, only fair to observe that I have not been able to obtain a perusal of *Doe dem Daniel v. Woodroffe*, as reported in the Jurist and House of Lords Cases, and it is just possible that some facts may there appear which are not set out in either the Law Journal or Meeson and Welsby, though this seems extremely improbable. — I remain, &c.,

LUCAS CORDES.

The Woodlands, near Newport, 13th April, 1854.

P.S.—We are obliged to Mr. Cordes for the above communication, and intend to give our views on the matters referred to; but we shall be glad in the mean time to have the opinion of any other gentlemen who have given, or may be willing to give, their attention to the case of *Daniel v. Woodroffe*.—Eds

Littleton's Tenures—Half-blood—Descent.

GENTLEMEN,—Having been much puzzled by the two last questions in sec. 8, p. 126, of "*Littleton's Tenures*," now publishing by you, I shall feel obliged if you will inform me whether the following is a correct solution of them.

In the first place I take the pedigree to be thus: A man by his first wife has a daughter and a son (say John), and by his second

wife a son (say Henry) only; and as seisin, &c., is mentioned, I suppose the question relates to the law as it stood previous to the passing of 3 & 4 Wm. 4, c. 106.

This being the case, I think the father having purchased an estate in fee, upon his death it would go to his eldest son (John), and that, upon John's decease, without issue, his brother Henry would take, and not his sister; for, although John by entry, &c., made himself the root of descent, his sister could not take as his heir, for "whoever would make himself heir to the person last seised must show himself heir to his real or supposed ancestor." A father cannot be of half-blood to his children, therefore I am of opinion that upon the death of John his brother Henry, and not his sister, took, for, the estate going in the male line, his sister, although she was heir to her brother John, could not make herself heir to his ancestor; but I think that John might have prevented his half-brother from inheriting previously to his sister by deed limiting the fee to his heirs female.—I am, &c.,

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NOTE.—We have received several communications respecting some points arising out of Littleton's Tenures, and we are glad to find that the method of editing that work is approved, and that the object of it (as of the other works), viz., to excite the curiosity and keep alive the attention of the student, has in some degree been obtained. It is not often that law books have the effect of interesting the readers thereof, and, therefore, we take it as a favourable sign that some of our subscribers have been interested with the "Tenures," and the questions given thereon. Among others received is the above communication, which we insert, as it may be useful to our readers. The questions referred to by our correspondent we may mention for the benefit of those of our readers who may not have the work, are the following: "There are two half-brothers; their father purchases lands, and dies; one brother obtains seisin, and dies without issue, but leaving a sister; who is his heir? Could the brother who was seised, by any and what means, prevent the half-brother from inheriting previously to his sister? (see notes to sects. 4, 12)." We have to observe, in the first place, that the supposition of our correspondent that because seisin was mentioned, the questions must necessarily relate to the old law, is not well grounded. For we expressly stated in a previous number, when noticing the plan of editing the works, and of framing the questions, our object was to keep the student on the watch, and to exercise his faculties, and for these purposes we have frequently put the questions in such a way as to require consideration before they are answered. The statements in the first of the questions referred to, to the effect that there are two half-brothers, and that their father purchases lands

might have sufficed to show the reader that the question was intended to apply to the new law of descents. Under the old law it would not have mattered whether the father purchased or not, for the seisin of the son would have made him the root or stock of descent, but under the new law the fact of the father being a purchaser is of great importance; for the descent is to be traced from him notwithstanding his son's seisin. We mentioned the seisin to give the student a more forcible idea of the new rule of law, and of its contrast with the old doctrine. On the death of the son who obtained seisin, without issue, notwithstanding such seisin, the brother would take the land and not the sister; for the descent is to be traced not from the party last dying seized, but from the purchaser, which in our case is the father. Still there are acts by which the son whilst seized might have given his sister of the whole blood a priority over his half-brother, but these could, of course, only be by making him the stock or root of descent, in the manner pointed out in the notes to sects. 4 and 12.

Our correspondent, assuming that we meant to speak of the old law, gives his opinion that, on the death of the brother seized, his brother of the half-blood would be preferred to the sister of the whole blood, but this is in express contradiction to the well-established maxim which uniformly prevailed prior to the New Inheritance Act, that *possessio fratris de feodo simplici fecit sororem esse heredem*. Our correspondent supposes the sister could not take because she could not show herself heir to her real or supposed ancestor. We are inclined to think that there is some ingenuity in this, as there certainly is novelty. Our correspondent means that as the living half-brother would, if the descent were to be traced from the ancestor (real or supposed), be heir to the estate, so he must take notwithstanding the seisin of the deceased half-brother. But he is mistaken in saying that the sister could not make herself heir to the ancestor in the lifetime of the half-brother: it was sufficient for her to show that she could by possibility be heir to the real or supposed ancestor, and then the existence of the half-brother, who never could inherit to his deceased brother, would not be any impediment.

Our correspondent is also wrong in supposing that John could have prevented his half-brother from inheriting previously to his sister by limiting the fee by a deed to his heirs *female*; no such limitation could be made with any effect, for it is well established that a new mode of inheritance in fee simple cannot be created by a subject, and that, therefore, a limitation to a man and his heirs female (which is an estate unknown to the law) would be void (see Litt. s. 31; 2 Black. Com. 115; Noy's Max. p. 71, n. a, by Byth.; Co. Litt. 27 a).

Littleton—Possession of Co-tenants.

GENTLEMEN,—On reading your edition of Littleton, I find, at p. 81, a statement that by the 3 & 4 Will. 4., c. 27, s. 12, the possession of a *co-parcener* of more than his share of the property shall not be deemed to be the possession of the other co-parcener. Now I naturally concluded that this provision was confined to co-parceners, but on turning to the statute, I find it also applies to joint-tenants and tenants in common. I think you should mention this, lest others of your readers should be misled.—I am, &c.,

LECTOR.

NOTE.—We beg to thank "Lector" for his communication, as we are desirous to make the works comprised in the "LIBRARY" as perfect as possible. We should mention that the note is appended to a section of Littleton, treating only of co-parceners, so that it was natural to confine the note to such. However, our readers had better note the omission, which will be supplied in the next work, *viz.*, Coke's Comment. We may add that there was an earlier case than that of *Culley v. Taylerson* (mentioned p. 81 of Littleton), as to the retrospective effect of the provisions of sect. 12 of the Act, but it was only at *Nisi Prius*. The case is *Doe dem. Holt v. Horrocks* (1 Car. and Kirw. 566), and the judge (Mr. Just. Cresswell) there ruled that the statute operates to make the possession of tenants in common a separate possession from the time they first became tenants in common, and not merely from the time of the passing of that statute. The same rule will of course apply to joint tenants and co-parceners. The decision in *Culley v. Doe dem. Taylerson* was, that one tenant in common who has been out of possession for twenty years prior to the Act, is barred by secs. 2 and 12 of the 3 & 4 Will. 4, c. 27, from bringing an ejectment.

GENTLEMEN,—I do not wish to appear as a complainant, but really I should have been glad if, instead of merely giving questions like those in *italics* in your Lib. Edition of Littleton, you had furnished the Answers also. I have felt great difficulty, in several instances in making out the correct answers, and should have been better satisfied to have had your answer in the book. You have told us that the "Questions" embrace every proposition in the text, and you might have added some matter not in the text, which, however, I do not consider an advantage; as an instance—I should like to know what is meant by the *italic* portion of the following, at page 125: "Can a maternal inheritance be turned to a paternal one in such a way?" (*or vice versâ*, see *Com. Dig. tit., "Estates" A., citing Co. Litt. 13a*). As I have neither *Com. Dig.* nor Coke's work, I am unable to say

what it is you mean, and will therefore thank you for the information, either by letter or through the Magazine,—I am, &c.,

S. C. L.

NOTE.—We do not conceive that any complaint can be fairly made to our having inserted questions to which answers are not to be found in the body of the work, particularly as we stated that our object in so doing was to leave something for the reader to work out for himself, so as to give him a habit of self-reliance, and to keep him on the alert, whilst engaged in the study of the work. With respect to the particular question referred to by our correspondent, which is—whether a paternal inheritance can be turned to a maternal one—it is laid down in Comyns' Dig., *ut suprâ*: "If a man gives land to A., and his heirs of the part of his mother, the words "of the part of his mother" are void; for none can create a new inheritance or descent not allowed by law.—Eds.

DIGEST OF RECENT CASES.

EQUITY PRACTICE.—*Procedure Amendment Act, s. 48*—*Direction for sale instead of foreclosure, amount of deposit, form of the order* [*antè*, pp. 88, 89].—The amount of "reasonable sum of money" to be deposited in court when a sale is asked instead of a foreclosure, under the 48th sec. of the statute 15 & 16 Vic. c. 86, is such a sum as will probably cover all possible expenses of abstracts, investigation of title, &c., and also of an abortive sale. The form of such an order is, "Certify within one week the deposit made, and let there be a sale; if property not sold within six months then let there be a foreclosure." *Bellamy v. Cockle*, 23 Law Times Rep. 20.

FRAUDULENT CONVEYANCE.—*Bankrupt—Transfer fraudulent under 13 Eliz. c. 5—Transfer void as against subsequent creditors.*—The following decision certainly shows the inclination of the courts to carry the doctrines of fraudulent conveyances to their full extent. The goods of B., a trader, having been seized under a *f. fa.* by the sheriff, F. paid out the sheriff, who executed a bill of sale to him. B. had other creditors at the time, and an agreement was executed by B. and F., under which F. was to hold the goods for a certain time, and re-transfer them to B. on repayment of the sum paid to the sheriff; it was held that the object of the transaction was not merely to relieve B. from a forced sale under the execution, but, with the knowledge of F., to protect the goods from the other creditors,

and that the sale was void under the 13 Eliz. c. 5, and an act of bankruptcy by B. *Seemle*, that the sale would have been also void as against persons who became creditors subsequently to it, if they might have been delayed or defrauded thereby. *Graham and Another v. Furber*, 18 Jur. 226.

INSOLVENT.—5 & 6 Vic., c. 116, and 7 & 8 Vic., c. 96.—*Debt fraudulently omitted at creditor's request barred.*—Where a party who petitions for his protection under the insolvent Acts, 5 & 6 Vic., c. 116, and 7 & 8 Vic., c. 96, omits a debt from his schedule, with the knowledge and consent, and through the contrivance and procurement of the party to whom it is owing, the debt is barred. (*Wilkin v. Manning*, 18 Jur. 271.) If the insolvent had given a *new* security for the debt, and the creditor then sued him thereon, he would not be liable; on the authority of those cases in which it has been held that a warrant of attorney and cognovit given under similar circumstances to this, under the former insolvent Acts (of which the principle is the same as under the Protection of Insolvent Acts), could not be enforced. (See *Tabram v. Freeman*, 2 Crompt. and Mess. 451; *Jackson v. Davidson*, 4 Barn. and Ald. 691).

RAILWAY.—*Liability to maintain Fences*—*Highway adjoining Railway*, 8 & 9 Vict. c. 20, s. 68.—There have lately been three decisions of some importance respecting the liabilities of railway companies for injuries to cattle getting on their lines, and in connection therewith, as to the duties of the company to keep the gates closed, and the fences adjoining their lines in proper repair. In *Fawcett v. York and Midland Railway Co.* (16 Qu. Ben. Rep. 610; S. C. 15 Jur. 173; 20 Law Journ. N. S., Q. B. 222), it was held that a railway company is, under the 5 & 6 Vict. c. 55, s. 9, bound to keep the gates at the ends of level crossings closed against all persons or cattle upon the highway, whether lawfully there or not, and they are liable to an action for an injury arising from a breach of that duty. In *Ricketts v. E. and W. India Docks and Birmingham Junction Rail. Co.* (21 Law Journ. N. S. C. P. 201; S. C. 16 Jur. 1072), it was held that neither under the Railway Clauses Consolidation Act, 8 & 9 Vict. c. 20, nor at common law, is there any obligation on the part of a railway company to fence the railway, as against any other than the owners or occupiers of the adjoining land. In the third case we refer to, it was held, that a railway company are not either at common law or under the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, s. 68, bound to fence against cattle straying on a high road running alongside of their railway, and they are therefore not liable for an injury sustained by such cattle in getting from such high road upon their railway through a defect of the fences, although the cattle had strayed on the high road without any

fault of their owner. *The Manchester, Sheffield, and Lincolnshire Railway Company, apps.; Wallis and Another, resps.*, 18 Jur. 268.

VENDOR AND PURCHASER.—*Charge of debts—Liability of purchaser to see to the application of purchase-money.*—It is settled that land devised to executors, subject to a general charge of debts, or in trust to pay debts generally, will enable the executors to sell, and make a good title to the land, and that a purchaser is not bound to see to the application of the purchase-money. It is also settled that if a trust be for the payment of specified or scheduled debts, or for payment of all legacies simply (not including debts) the purchaser is bound to see to the application of the purchase-money: in the latter case because the legacies are specified as distinctly as debts that are scheduled. But if the trust be for the payment of both debts and legacies generally, then the purchaser is not bound to see to the application of the purchase-money in the payment of the legacies, although they are specified in the will, because to do so would involve him in the necessity of seeing to the payment of debts generally, that is to say to the due performance of an unlimited and undefined trust. A testator who was seised of a freehold estate at N., subject to a mortgage, and also to freehold estates at A. and S., devised the N. estate to the plaintiffs, and charged his estate at A., and his personal estate, with the payment of the said mortgage-debt, and of two legacies and of all his other debts; and if the said estate at A., and his personal estate, should not be sufficient for that purpose, then he charged the estate at S. with the deficiency. The estate at A. and the personal estate were exhausted in the payment of the testator's debts, other than the said mortgage. The estate at S. was sold by the executor, the devisee for life, and the heir-at-law of the testator, to a party through whom the defendant claimed. Upon a bill filed to make this property liable in the hands of the purchaser to the payment of the mortgage due on the property devised to the plaintiff, it was held that the specific mention of this debt, with the other debts of the testator charged by the will upon the property at S., did not create an exception to the rule that where there is a general charge of debts created by a will the purchaser is not bound to see to the application of the purchase-money, and therefore that the defendant held the estate free from the said mortgage debt. *Robinson v. Lowater*, 23 Law Tim. Rep. 17.

LETTERS ON SIMPLE CONTRACTS.

[Continued from p. 214.]

Contracts in restraint of trade [continued from p. 214]—*Ward v. Byrne*—*Whittaker v. Howe*—*Questions on Letter VI.* [pp. 197—214].

We have not stated the case of *Whittaker v. Howe*, and the objections thereto, sufficiently at p. 209, and we now, therefore, avail ourselves of the opportunity of supplying the deficiency, and also, with a view to the clear understanding of the objections to that decision, the earlier case of *Ward v. Byrne* (5 Mees. and Wels. 548).

Ward v. Byrne—*Restraint not limited in space, and extending to all modes of carrying on business*—*Whittaker v. Howe*—*Not to practise as solicitor in Great Britain for a limited time.*—In the case of *Ward v. Byrne* (5 Mees. and W. 548), the court, holding that a bond entered into by the defendant prevented him (if valid) generally from setting up in business on his own account as a coal-merchant, or being employed by any other person in that business for a certain time limited in the bond, held as a consequence that the bond was void in law, as this would be a restriction unlimited in a point of *space*. “The parties” said Lord Abinger, C. B., “stand thus—The defendant served the plaintiff in his capacity as a coal-merchant, probably to keep his accounts; and if the plaintiff had limited the restraint to his accepting any office as a clerk to a coal-merchant within a given distance, *so as not to prejudice the plaintiff*, that might have been reasonable. But the construction which the court have put upon the contract is, that he (the defendant) is not to become a coal-merchant, or serve one in any capacity whatever for the space of nine months. This restriction extends to all parts of England, and to every species of engagement by which this person during that time could gain a livelihood by his trade. What protection could the plaintiff require to an extent like this? Can it be supposed, that the plaintiff’s trade could be prejudiced by this man’s entering into the service of a coal-merchant in Scotland? The obligation which the defendant undertakes by his bond is, that he neither shall be nor serve a coal-merchant in any capacity for nine months. That goes so far beyond what the plaintiff could require, that it is an unreasonable restriction. It is void on both grounds.” And per Parke, B.—“The question is, whether the restraint is not void as being against the general policy of the law. The principle

on which these cases stand is laid down in *Mitchell v. Reynolds* (1 P. Will. 181), that the public have an interest in every person carrying on his trade freely, and therefore a general restraint of trade is void on a principle of public policy, when entered into by bond or by simple contract." And further: "It seems to me that there is no authority in favour of the position that there can be a general restriction limited only as to time." It might therefore be considered, but for the case of *Whittaker v. Howe*, which we will next notice, that any agreement by which a party affects to bind himself not to carry on trade either with or without limit as to time is void, if it be not limited as to locality. But in the case of *Whittaker v. Howe* (3 Beav. 383), Lord Langdale, M. R., held an agreement by a solicitor for valuable consideration not to practise as solicitor in any part of Great Britain for twenty years without the consent of the plaintiff, valid, and his Lordship accordingly restrained the defendant from practising as an attorney or solicitor in any part of Great Britain, in his own name or in the name of any other person, and from endeavouring to induce any persons, clients of the plaintiff, to cease or abstain from employing the plaintiff as their attorney or solicitor. A writer in the *Jurist* (vol. vi. pt. ii. p. 236) observes:—"The Master of the Rolls appears, therefore, to have considered that the rule is not merely that a general restriction on trade is void, but that every restriction on trade is void, subject to this among other exceptions, that if it can be shown that the particular restriction before the court is not *de facto* injurious to the public, and is not unreasonable, as regards the protection of the contracting party, having regard to the nature of the business to which the restriction applies, then the general rule does not apply, and the contract may be supported. In this view of the case *Whittaker v. Howe*, although at first sight it seems inconsistent with the cases in general, and in particular with *Ward v. Byrne*, will be found perhaps not to impugn the authority of that case; for although, in *Ward v. Byrne*, the circumstances, so far as regards time and locality, were of exactly the same nature as in *Whittaker v. Howe*, yet in *Ward v. Byrne* it would seem, from what fell from the Judges, that the determination was partly grounded on this—that the restriction, to the extent to which it was carried, was not necessary for the protection of the contracting party, and therefore there was nothing to displace the application of the maxim, that as tending to the withdrawal of the restricted party from serving the public, and as tending to preclude him from using his trade as a means of subsistence, it was against public policy. It cannot, however, be denied that the case of *Whittaker v. Howe* to some extent modifies, if it does not actually clash with, the doctrine of preceding cases, and unless that case is overruled, the principle must now, as we apprehend, be considered

this—that a restriction upon trade generally, without any limit as to locality, is bad, unless the nature of the business to which it refers is such that the protection of the contracting party may require so extensive a restriction, and that the public interest may not be damaged by the withdrawal of the services of the individual restrained.”

In the case of *Nicholls v. Stretton* (*antè*, pp. 210, 211), the counsel arguing in favour of the validity of the restriction in that case referred to the case of *Whittaker v. Howe* as supporting his argument, inasmuch as there Lord Langdale held, that Howe's agreement not to practise as solicitor or attorney in any part of Great Britain for the space of twenty years, without the consent of Whittaker, was valid. Lord Denman observed, that in *Whittaker v. Howe*, the party with whom the covenant was made might remove the objection by giving his consent; whereas, in *Nicholls v. Stretton*, the will and pleasure of the party was at the foundation of the contract. Mr. Just. Patteson said that the restriction in *Whittaker v. Howe* was limited to twenty years; adding, however, very justly, “I do not see how to reconcile *Ward v. Byrne* (*suprà*) with *Whittaker v. Howe*.”

QUESTIONS ON LETTER VI.

(*Antè*, p. 197 to p. 214).

1. Will the courts enforce a contract opposed to public policy?
2. What maxims are applicable to contracts against public policy?
3. What is the expression most usually made use of in order to denote the illegality of contracts?
4. How many and what kinds of illegality are there affecting contracts?
5. What is Mr. Just. Crosswell's notion of the meaning of “public policy?” and what Mr. Baron Parke's? and what Lord Truro's? (pp. 197, 198).
6. By whom is the question, whether a contract is void as contrary to public policy, to be decided?
7. Covenant to pay an annuity; the deed ought to be enrolled, but is not; can the covenant be enforced?
8. A grant to charitable uses is not enrolled; can the covenants therein be enforced?
9. Is there any distinction between a contract void *per se* and one incidental to an illegal contract?
10. Is a bond of indemnity to secure the payment of an illegal debt enforceable?
11. Where the illegality consists of acts wholly collateral, does it affect the validity of the contract?
12. Will the omission from the contract of provisions securing the observance of a statutory enactment, make the contract void?

13. Will a partial illegality invalidate the whole of a contract?
14. In a deed charging a benefice, and which charge is contrary to law, there is a covenant to pay the money; is that covenant enforceable?
15. Can illegality be shown by extrinsic evidence; is there any difference in this respect between simple contracts and specialties? (p. 200).
16. Under what circumstances can a party to a contract against public policy have relief in equity?
17. Is there any difference between illegalities which are *mala prohibita* and those which are *mala in se*?
18. Is there any difference where the illegality is one made by statute for the purpose of protecting the revenue? (pp. 200, 201).
19. Where a contract is not on the face of it illegal, can the intention of the parties to it be looked at?
20. Contract for sale of drugs to a brewer; can it be shown that the vendor knew they were to be applied to the brewer's beer, and will that be a defence? (pp. 201, 202).
21. After the completion or abandonment of an illegal contract, will a new agreement between them be valid? Would this be best done by a deed, and why?
22. Can a lien arise under an illegal contract?
23. On what is the rule avoiding contracts in unlimited restraint of trade founded?
24. What is Mr. Just. Cresswell's view of the rule avoiding such contracts? and what did Lord St. Leonards observe thereupon?
25. What was the decision in the *Year Book*, 2 Hen. 5, as to an obligation with a condition not to exercise a trade within a stated town for a limited time? Would such an obligation be now held valid? (pp. 202, 203).
26. What is the general rule as to a contract restraining trade? (pp. 203, 204, 208, 209).
27. Is a contract in total restraint of trade valid? Will the existence of a valuable consideration make any difference?
28. What is the reason why a total restraint of trade cannot be valid?
29. Is a partial restraint of trade valid?
30. Must there be a consideration?
31. Must the restraint be a reasonable one? and what is to be looked to in considering this question? (p. 204; see also pp. 206, 210).
32. Where a consideration appears in a deed, will the courts examine into its sufficiency? (p. 204; see also, p. 210).
33. Is it necessary that the consideration should appear to have been paid in respect of the clause restraining the trading? or will it

suffice if the whole contract disclose a consideration in respect of the principal matter to which the restraint is only incidental? (pp. 204, 205).

34. If an articulated clerk should, in consideration of the instruction to be given to him, covenant not to carry on the business of a solicitor within a limited space, would it be binding, and on what ground?

35. A specialty imports a consideration; how then can it be necessary to have a consideration stated, or at least appearing, in a deed in order to support a condition restraining the exercise of a trade?

36. A. engages to work for his life exclusively for B., but B. is not bound to employ A.? is the contract binding on A.? (pp. 205, 206).

37. A dentist, in consideration of instruction and of a determinable salary, engaged to abstain from practising over a district of 200 miles; was this binding on him?

38. Is a restraint of trade, limited to a certain reasonable space, but not limited as to time, valid? (p. 206; see also, pp. 209, 213).

39. Is a restraint limited as to time, but not as to space, valid?

40. What is the general rule as to the quantum of restraint? (p. 206; see also, p. 204).

41. Where the limit is indefinite as to time, will it be important to look to the extent of district? (p. 206; see also, p. 209).

42. Where there is no restriction as to place, will it be important that only certain modes of carrying on the business are restrained? (p. 206; see also, p. 209).

43. *Wallis v. Day* (p. 207).—Sale by a carrier of his business, with a covenant not to carry on such trade except as thereafter mentioned, *viz.*, as assistant to the purchaser at a salary: is this binding?

44. Is a covenant not to carry on a trade within a limited space, but extending to the whole of the party's life, valid? (p. 207; see also, p. 212).

45. Is a contract, void in part as being an unreasonable restraint of trade, valid as to another part not so affected?

46. Is a contract, reasonable at the time of entering into it, liable to be avoided by a possible inconvenience to a third party? (pp. 207, 208).

47. *Hitchcock v. Coker* (pp. 209, 210).—On a sale of a baker's business, the vendor contracts not to supply his former customers with any bread for several years; is this binding?

48. Under what circumstances will the restriction as to time be important? (p. 209).

49. *Bunn v. Guy*—*Whittaker v. Howe* (p. 209; also, p. 258).—Sale by a solicitor of his business and covenant not to practise

within 150 miles from the town, without limit as to time; is this valid? In such a case the covenant was not to practise in any part of Great Britain for twenty years; was this valid? Can the case of *Whittaker v. Howe* be supported? (p. 209; also, p. 238).

50. What is the test to be applied to the question of the restraint being reasonable or not?

51. *Hitchcock v. Coker* (pp. 209, 210).—Employment of assistant to a druggist at a salary; agreement not to practise within three miles of the town *at any time thereafter*; £500 to be paid as liquidated damages; was this valid? can the court examine into the sufficiency of consideration? (also, p. 204). Was the restraint unreasonable because not limited to the employer's life, or to the time of his carrying on his trade? (p. 210; see also, pp. 212, 213).

52. *Mallan v. May* (p. 210).—Employment of assistant to a dentist for four years; covenant not to practise *thereafter* in the town, or any place in Great Britain where the employer practised; was this void *in toto* or in part only? Was it divisible?

53. Who is to determine whether the restraint be reasonable or not?

54. Is the populousness of the district within which the party is not to trade a material point?

55. *Nicholls v. Stretton* (pp. 210, 211).—Articled clerk covenanted not to be concerned after expiration of articles for any then or future clients of the master; was this too extensive? was it a divisible covenant?

56. *Sainter v. Ferguson* (pp. 211, 212).—Employment of assistant to a surgeon, with an agreement not, *at any time*, to practise at the town, or within seven miles, under a penalty of £500; was there a sufficient consideration for the agreement? Was the £500 recoverable as liquidated damages?

57. *Atkins v. Kinneir* (p. 212).—Where there is a contract not to practise within a certain distance, how is such distance to be measured?

58. *Elwes v. Croft* (p. 212).—Vendor of business covenanted not to carry on a similar business within a reasonable distance without any limitation as to time; will the courts confine the covenant to the time the purchaser or his assignee carries on the business, or to the duration of the term for which the premises were leased?

59. *Tallis v. Tallis* (pp. 213, 214).—On a dissolution of partnership of publishers, the retiring partner covenanted not, *at any time*, to carry on the canvassing trade within 150 miles of London, or within fifty miles of Edinburgh or Dublin, or in any place in Great Britain or Ireland, where the continuing partner might carry on trade; was the restraint unreasonable to any extent? What must appear to render such a covenant invalid?

60. *Ward v. Byrnes*.—A clerk to a coal-merchant binds himself not to set up as such, or be employed by any coal-merchant, for a limited time; was the bond valid?

61. *Whittaker v. Howe*.—A solicitor, on the sale of his business, agrees not to practise in Great Britain for a limited time; is this valid?

THE EDUCATION OF LAW STUDENTS.

As our readers are naturally interested in the subject of Legal Education, we suppose they will like to know what is doing therein, even though it does not apply to their own branch of the profession. There can be little doubt that the example of the Benchers as to their students, will eventually induce the solicitors to make somewhat similar provisions for their students.

The Council of Legal Education have approved of the following rules, for the public examination of students *for the Bar* :—

As an inducement to students to propose themselves for examination, studentships shall be founded of fifty guineas per annum each, to continue for a period of three years, and one such studentship shall be conferred on the most distinguished student at each public examination; and further, the examiners shall select and certify the names of three other students who shall have passed the next best examinations, and the Inns of Court to which such students belong may, if desired, dispense with any terms, not exceeding two, that may remain to be kept by such students previously to their being called to the bar. Provided that the examiners shall not be obliged to confer or grant any studentship or certificate unless they shall be of opinion that the examination of the students they select has been such as entitles them thereto.

At every call to the Bar, those students who have passed a public examination, and either obtained a studentship or a certificate of honour, shall take rank in seniority over all other students who shall be called on the same day.

No student shall be eligible to be called to the bar who shall not either have attended during one whole year the lectures of two of the Readers, or have satisfactorily passed a public examination.

RULES FOR THE PUBLIC EXAMINATION OF CANDIDATES FOR HONOURS, OR CERTIFICATES ENTITLING STUDENTS TO BE CALLED TO THE BAR.

An examination will be held in next Trinity Term, to which a student of any of the Inns of Court, who is desirous of becoming a

candidate for a studentship or honours, or of obtaining a certificate of fitness for being called to the bar, will be admissible.

Each student proposing to submit himself for examination will be required to enter his name at the treasurer's-office of the Inn of Court to which he belongs on or before Monday, the 15th day of May next; and he will further be required to state in writing, whether his object in offering himself for examination is to compete for a studentship or other honourable distinction, or whether he is merely desirous of obtaining a certificate preliminary to a call to the Bar.

The examination will commence on Monday, the 22nd day of May next, and will be continued on the Tuesday and Wednesday following.

It will take place in the Benchers' Reading-room of Lincoln's-inn, and the doors will be closed ten minutes after the time appointed for the commencement of the examination.

The examination by printed questions will be conducted in the following order:—

Monday morning, the 22nd May, at half-past nine, on Constitutional Law and Legal History; in the afternoon, at half-past one, on Equity.

Tuesday morning, the 23rd May, at half-past nine, on Common Law; in the afternoon, at half-past one, on the Law of Real Property, &c.

Wednesday morning, the 24th May, at half-past nine, on Jurisprudence and the Civil Law; in the afternoon, at half-past one, a paper will be given to the students including questions bearing upon all the foregoing subjects of examination.

The oral examination will be conducted in the same order, during the same hours, and on the same subjects, as those already marked out for the examination by printed questions, except that on Wednesday afternoon there will be no oral examination.

The oral examination of each student will be conducted apart from the other students; and the character of that examination will vary according as the student is a candidate for honours or a studentship, or desires simply to obtain a certificate.

The oral examination and printed questions will be founded on the books below mentioned, regard being had, however, to the particular object with a view to which the student presents himself for examination.

In determining the question whether a student has passed the examination in such a manner as to entitle him to be called to the Bar, the examiners will principally have regard to the general knowledge of law and jurisprudence which he has displayed.

A student may present himself at any number of examinations, until he shall have obtained a certificate.

Any student who shall obtain a certificate may present himself a second time for examination as a candidate for the studentship, but only at one of the three examinations immediately succeeding that at which he shall have obtained such certificate; provided, that if any student so presenting himself shall not succeed in obtaining the studentship, his name shall not appear in the list.

Students who have kept more than eleven terms shall not be admitted to an examination for the studentship.

The **READER ON CONSTITUTIONAL LAW** and **LEGAL HISTORY** will expect all students to answer any general questions relating to the History of England, and to know the outlines of Constitutional Law.

The candidates for distinction will be expected to know the progress of our institutions, and the changes of our Constitution. They will be examined on the History of the Conqueror and his immediate Successors; on the Reign of Henry II.; on the circumstances which led to the signing of Magna Charta. They will be expected also to know thoroughly the History of Elizabeth, of Charles I., and William III.; and to give an account of the more remarkable State Trials from the time of James I. to that of Queen Anne.

The books for the ordinary examination will be Rapin and Hallam.

Those for candidates for distinction will be Hallam, Rapin, Burnet, Millar, Clarendon, May, the State Trials, and the Parliamentary History.

The **READER ON EQUITY** proposes to examine in the following books:—

1. Smith's Manual of Equity Jurisprudence; the first seven chapters of Story's Commentaries of Equity Jurisprudence, vol. i.; Wigram's Points in the Law of Discovery ("Introductory Observations" and "First Proposition"); the Act for the Improvement of Equity Jurisdiction, 15 & 16 Vict. c. 86.

2. Mitford on Pleadings in the Court of Chancery; White and Tudor's Leading Cases (with the Notes), vols. i. and ii.

Candidates for certificates of fitness to be called to the Bar will be expected to be well acquainted with the books mentioned in the first of the above classes.

Candidates for a studentship or honours will be examined in the books mentioned in the two classes.

The **READER ON THE LAW OF REAL PROPERTY** proposes to examine in the following books and subjects:—

1. Williams—Real Property.

2. Learning of Powers—1 Sugd. Pow. cc. 1—4.

3. The Alienation of Freehold Estates by Tenants in Tail and Married Women, with reference to the 3 & 4 Wm. 4, c. 74.

4. The Law of Perpetuity, with reference to the Doctrine of Cyprès, Powers of Sale and Exchange, and Powers of Appointment.

5. The Liability of Purchasers to see to the Application of their Purchase Money.

6. The Law of Settlement by Deed, with reference to Ante-Nuptial, Post-Nuptial, and Voluntary Settlements.

Candidates for a studentship or other honorary distinction will be examined in all the foregoing books and subjects. Candidates for a certificate will be examined in 1, 2, and 3.

The READER ON JURISPRUDENCE and the CIVIL LAW proposes to examine in the following subjects:—

1. The Relation of Jurisprudence to Moral Philosophy. Austin—Province of Jurisprudence Determined, lect. 5; Whewell—Elements of Morality and Polity, book 4, vol. ii. (2nd edit.) The student must be prepared to indicate the points of conflict between these writers.

2. The Roman Law of Servitudes, Prescriptions, Testaments, Legacies, and Fidei-Commissa. The modern Commentaries consulted may be, on the first two subjects, the *Doctrina Pandectarum* of Mühlenbruch; and on the three last, the *Institutiones* or *Commentarii Juris Romani Privati* of Warnkönig.

3. The Roman Law of Civil Process at the era of Gaius. Gaius—Comment. lib. 4. The Modern Treatises referred to may be the *Innere Geschichte des Römischen Rechts* of Tigerström, pp. 86 et seq.; or J. G. Phillimore's Introduction to the Study of Roman Law, pp. 16 et seq.

4. The Conflict and Harmony of Laws on the Subject of Marriage and Divorce. Story—Conflict of Laws, ec. 5, 6, 7.

5. National Rights of Self-Preservation, Independence, and Equality. Wheaton—Elements of International Law, part 1, cc. 1, 2, 3.

Candidates for distinction will be examined in all the foregoing subjects.

Candidates for a certificate will be examined in 4 and 5, and also in 2, so far as the subjects enumerated are treated of in the Institutes of Justinian.

The READER ON COMMON LAW proposes to examine in the following books and subjects:—

1. The ordinary steps in an Action at Law.

2. The Parties to Contracts—Smith's Lectures on Contracts, 8—10 (omitting the note commencing at p. 253).

3. Offences against Property—Stephen Com. book 6, c. 5.

4. The Law of Landlord and Tenant, so far as it relates to the

Right to Detrain and the Obligation to Repair—Woodf. L. and T. 6th edit. book 2, n. 2, ss. 1—3; c. 4, ss. 1, 2.

5. The following Leading Cases, with the Notes thereto (Smith's L. C. 3rd edit.)—Semayne's Case, The Six Carpenters' Case, Price v. the Earl of Torrington, and Higham v. Ridgway.

Candidates for certificates of fitness to be called to the Bar will be examined in the 1st, 2nd, and 3rd of the above subjects.

Candidates for the studentship or for honours will be expected to be conversant with all the above subjects.

AN ANALYSIS OF PRESTON ON ESTATES.

In our earlier volumes we gave a short analysis of the first edition of "Preston on Estates," but as that is now many years ago, we have thought it would be acceptable if we presented a series of "Questions and Answers" on the second edition of that work. Our readers may not be aware that the second edition is only a fragment, but so far as it goes it certainly contains valuable matter, and we think we could not do a better service for students than to give an analysis of it by way of Questions and Answers. In doing this we shall, at every available opportunity, notice some of the later statutes and decisions, so as to bring down, as far as possible, Mr. Preston's work to the present state of the law. This will, we trust, be satisfactory to our readers, though it will greatly lengthen our analysis, and at times rather break in upon the connection of the subjects:—

What are the subjects of property in which estates may exist?

Land, in its several species, and houses and other edifices thereon, and also interests arising or issuing out of and being collateral to land, as rents, commons, &c., and personal duties, as annuities, offices and privileges, as stewardship, &c. (vol. i. p. 7).

What are these generally divided into?

1. Lands; 2. Tenements; 3. Hereditaments (*ibid.*).

NOTE.—We have already given our views upon the use of the expression "lands, tenements, and hereditaments" (*antè*, p. 221—224). Mr. Burton (pl. 1, referring to Co. Litt. 4 a, 19 b. 20 a.) says, "the subjects of real, as distinguished from personal, property in England, are commonly included under the general denomination of lands and tenements; and they are, indeed, *all comprehended in the latter of those two words*. * * The word 'tenement' has also a confined sense, in which it is appropriated to the subjects of *feudal* tenure; but, in general, it includes not only land, but every modifi-

cation of right concerning it, to which the law has attributed a substantive, though invisible being. These incorporeal tenements consist of a right, not to the possession of the land itself, but to some benefit to arise out of it * * such are rents, commons, seignories, tithes, advowsons, local offices, and the like. The word 'hereditament' is still more comprehensive; for it is applicable not only to lands and tenements, but to some of the subjects of *personal* property (*anté*, p. 222), and to mere rights which imply a privation of property."

What does land comprehend?

All external subjects which are the objects of sensation, and admit of manual occupation, and are in their nature permanent and immovable, as a house, garden, orchard, &c. (8).

What would you call an upper chamber, and can it be conveyed?

An upper chamber of a house is a corporeal hereditament; it is said to be land, and would certainly pass in a conveyance (8).

NOTE.—Mr. Preston, at p. 214, after observing that so long as an estate of freehold subsists in property, whether corporeal or incorporeal, the estate is a freehold estate, adds: Hence it may be concluded, that the opinion sometimes advanced, asserting that an upper chamber in a house (10 Vin. Abr. 202) is no frank-tenement, is, at all events, questionable, probably erroneous. On principle an upper chamber is a corporeal hereditament (Shepp. Touch. 202; Co. Litt. 48), and it formerly lay in livery only (*ibid*).

What description of property is a rectory?

It is a corporeal hereditament, and it lay in livery (8).

What is essential to a rectory impropriate?

That there should be glebe or some other corporeal hereditament (8).

NOTE.—Comyns, in his Digest, tit. "Ecclesiastical Persons," C. 6, says: A rectory or parsonage consists of glebe, tithes, and oblation, established for the maintenance of a parson or a rector, to have cure of souls within the same parish, and there need not be more glebe than the soil of the church, or churchyard. But there ought to be some land; for, if tithes only be proved, it is not a rectory (1 Siderf. 91, 3 Salkeld, 377).

What is comprised under the word "tenement?"

Everything which may be holden, so as to create a tenancy, in the feudal sense of the word (8).

Is land a tenement, and why?

It is, in the above sense, a tenement, for all land is *held* mediately or immediately of the Crown (8).

Is a rent-charge or common of pasture a tenement?

Yes, in the above sense; though they are interests which are collateral to the soil. A rent-charge is *held* of the owner of the land,

as of freehold. However, Mr. Preston adds that, perhaps, rents and commons are not tenements, according to the strict rules of the law of tenures; they are so, however, in reputation; and are certainly tenements within the meaning of several statutes, particularly the statute relating to entails (*de donis*).

NOTE.—Rents and commons are always considered as tenements (See, however, Com. Dig. tit. Grant, E. 2). In *Rex v. Dersingham* (7 Term Rep. 67; 2 Bac. Abr. 97), it was held that common in gross is a matter of tenure, and is a *tenement* within the statute of the 13 & 14 Chas. 2. The word “tenement,” as stated by Mr. Burton (as quoted *suprà*), has a confined and a more extended sense; in the former, it is confined to subjects of feudal tenure; in the latter, it is extended to rights of benefits out of land.

Is a chief-rent a tenement?

Yes; it comes in lieu of the land, and is issuing out of the same (9).

Will an advowson pass by a devise of all lands and tenements?

It has been doubted whether an advowson is included under a devise of all lands and tenements; it is said, that in *Kenrey v. Langham* (Cas. temp. Talbot, 143), the Court of Queen’s Bench certified that an advowson was not comprehended under a devise in those terms, but it seems to have been on the peculiar terms of the will (9).

NOTE.—It is now established, that by a general devise of *lands* an advowson in gross will not pass, though by the words *tenements and hereditaments* it will, for an advowson is an hereditament (*Westfailing v. Westfailing*, 3 Atk. 460; *Pynchin v. Harris*, Cro. Jac. 371; *Pocock v. Lincoln*, 3 Brod. and Bing. 27), and in *Gully v. Exeter* (4 Bing. 290), it was expressly decided that an advowson would pass under the word “tenements” alone.

What is to be observed of Blackstone’s statement, that nothing is a tenement which is not of a permanent nature?

That it is not clear, whether permanency is applied to the durability of the subject or to the continuance of the interest. That the application of the term “permanent,” whether applied to the *subject* or to the *interest*, is equally vague, perhaps erroneous. Thus, a rent-charge is not in any respect permanent, any more than a personal annuity; yet the former is a tenement, whilst the latter is *not*. (9, 10).

To what is the term “hereditament” applied?

To everything corporeal and incorporeal, whether real, personal, or mixed, which may be taken in hereditary succession; hereditament, therefore, includes all lands and tenements, and all personal duties and privileges (as an annuity, office of almoner, &c.) in which there is an estate of inheritance (10, 11).

NOTE.—In the case of *Lloyd v. Jones* (6 Com. Ben. Rep. 81), Lord Truro said: "Hereditament is defined in the text-books of authority to signify all such things, whether corporeal or incorporeal, which a man may have to him and his heirs by way of inheritance, and which, if they be not otherwise bequeathed, come to him who is next of blood, and not to the executors or administrators as chattels do."

Are rents, and personal duties and privileges, called hereditaments?

Yes, when from the nature of the estate for which they are granted they are transmissible to heirs (11).

Where interests not descendible to heirs are carved out of incorporeal hereditaments, is the term "hereditament" applied to such incorporeal hereditaments?

Yes; for though in the case of incorporeal hereditaments, the quantity of the estate, and the means by which it is to be transmitted, give denomination to the subject generally, yet the subject retains its name as to *lesser* interests carved out of the general estate, notwithstanding these interests, in point of quality, may not be taken in hereditary succession (11).

Is there any inaccuracy in referring to parcels in a deed as *hereditaments* demised, limited, assigned, &c., for a term of years?

No; for by such reference nothing more is intended than to adopt the description used in the former instrument (11, 12).

NOTE.—Mr. Preston is speaking with reference to a previous demise of hereditaments as such: thus, he says, "if hereditaments are demised by that name, it is, in assigning them, or referring to them, equally proper to adopt this term, as descriptive of the particular subject." In strict propriety a mere chattel interest is not an hereditament; indeed, Mr. Preston (p. 14) mentions that Sheppard says, that hereditaments must be held by the *grantor* for an estate of inheritance, though Sheppard, as Mr. Preston also observes in another passage (Touchet. 88), admits that lands and other things *held for years* may pass under the description of an hereditament, and this latter (adds Mr. Preston, p. 14) "most clearly is the genuine and reasonable construction of law." However, in Noy's Treatise on Estates (usually inserted at the end of his "Maxims," p. 355, Byth. edit.), it is said "We call such things hereditaments which are hereditary, and in a natural body may descend from ancestor to heir, and from heir to heir for ever, or which in a body politic may successively or otherwise have a perpetual continuance, as honours, messuages, dignities, privileges, liberties, and the like. And to some purpose it makes no difference what estate or interest the party has, who enjoys any such thing; for although he has therein the basest or meanest estate that may be, yet the name of an hereditament in a thing enjoyed in a natural sense remains, because it is in its kind

hereditary, and an estate of inheritance has therein *always* its being in some person, except, by some accident in some special case, it happen to be for a time suspended or for ever extinguished, as shall afterwards appear. And, therefore, if he who has, but a term of years in lands, grant his interest in all the hereditaments which he occupies or enjoys, his interest in the lands is thereby granted; but yet, nevertheless, he who has therein but a term for certain years has but a chattel, and in regard thereof in common sense it loses the name of an hereditament; in the most usual and proper sense it retains the name of an hereditament only in such person who has therein an estate of freehold or inheritance. And, therefore, if a man seised of certain lands in fee, and possessed also of other lands for term of years, demise all his hereditaments to another for certain years, the lands wherein the lessor had but a term do *not* pass thereby, no more than they should pass in the same case if the lessor had demised all his tenements; and yet in a natural sense lands retain the name of a tenement and hereditament as well in a *termor* as they do in him who has therein a freehold or inheritance." This is a just distinction, but it is to be observed that Sheppard ("Touchstone," p. 92) says, that if a grant be made for years of all a man's hereditaments, tenements, or lands in a certain parish, and he is seised of some lands in fee and hath other lands for years only in the parish mentioned, all the lands, both those held in fee and those for a term of years pass; but otherwise, if the grant had been in fee or for life. However, Sheppard admits that it is said in Brooke's Abr. (no mean authority) tit. "Dine," 41, "that if a man give or grant all his lands and tenements in B., by this leases for years do not pass, for that the words intend freeholds at the least. It is not very likely that the question will arise now that deeds almost invariably state the premises demised with particularity, and even if it did arise, it is possible that the leaning which the courts have towards effectuating what they consider the intention of the parties would induce them to adopt the doctrine of Sheppard. However, it is to be borne in mind, that the distinction adverted to by Noy was acted on by the courts in the cases of wills, which are instruments favourably construed by the courts, and it has required a substantive enactment to get rid of this doctrine. Indeed, Sheppard (Touchstone, p. 437) says, "Whatsoever will pass by any words in a deed will pass by the same words in a will, and more also; for a will is always more favourably interpreted than a deed." The rule as to devises, which was established by the well-known case of *Rose v. Bartlett* (Cro. Car. 293) is "that where a man hath lands in fee and lands for years, and deviseth all his *lands and tenements*, the fee-simple lands only pass, and not the leases for years; but if he hath no fee-simple the lease for years passes."

In the case of *Thompson v. Lawley* (2 Bos. and P. 403), Lord Eldon recognised the above rule, which he said had been acknowledged for ages, and applied it to a case where the devise was of manors, messuage, *lands, tenements, and hereditaments*. The above rule, like every other rule of construction, yielded to an indication of the testator's intention that the leaseholds should pass; but no decision went the length of determining that words of limitation adapted to a chattel interest were to be considered as demonstrating an intention to include the leaseholds; at least not without some aid from the context (1 Jarman on Wills, 620). This exclusion of leaseholds from a general devise, where the testator has freeholds, has been abrogated by the 1 Vict. c. 26, s. 26, which enacts that "a devise of the land of the testator, or of the land of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold, or *leasehold* estate, if the testator had no freehold estate which would be described by it, shall be construed to include the customary, copyhold, and *leasehold* estates of the testator, or his customary, copyhold, and *leasehold* estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will."

How should a grant of a personal annuity in fee be framed?

It should purport to be from the grantor for himself and his heirs, as well as to the grantee and his heirs; for unless the heirs are bound, the law does not consider that there is any such lien or fund of a perpetual nature as will entitle the grantee to an estate to continue for ever (12). This point applies only to a *personal* annuity, and is material only with a view to entails and the rights of representatives (12).

NOTE.—In *Stafford v. Buckley* (2 Ves. sen. 170), Lord Hardwicke held that, an annuity in fee granted by the Crown out of the four-and-a-half per cent. duties payable for exports and imports at Barbadoes was merely a personal inheritance, and not entailable within the statute *de donis*. In the case of *Radburn v. Jervis* (3 Beav. 450) it was held that, a perpetual annuity granted by King Charles 2 to A. and his heirs, payable out of the coal duties, though descendible to A.'s heirs, was personal, and not real, estate. Mr. Burton, after speaking of rents as issuing out of lands, says, "All other rights to periodical payments are mere annuities; and though they may be made descendible to the heirs of the grantee, and then are rightly styled hereditaments, yet they are not *tenements*, and therefore not included in the statute *de donis*; and they may be disposed of by will as *personal* estate (*Aubin v. Daly*, 4 Barn. and Ald. 59).

Is land both a tenement and an hereditament ?

Yes (12).

May a tenement be an hereditament ?

Yes (12).

Can there be any and what hereditament, which is neither land nor a tenement ?

Yes ; an annuity in fee is an hereditament, but it is neither land nor a tenement (12). And an annuity for *life* is not land, tenement, nor hereditament (12).

Is every tenement an hereditament ?

No ; a rent-charge granted for life, though a tenement, is not an hereditament (12).

What other general division is there of the various kinds of property ?

Into such as lie in livery and such as lie in grant (13).

What is said to lie in livery ?

The first vested freehold estate in lands ; because such an estate by the common law was properly and generally conveyed by livery of seisin (13).

NOTE.—By the 8 & 9 Vict. c. 106, s. 2, all corporeal tenements and hereditaments are, so far as regards the conveyance of the *immediate* freehold thereof, to be deemed thenceforth to lie in *grant* as well as in livery. This statute, it will be seen, gives no validity to a grant of a freehold *in futuro* : the estate must take immediate effect. See *post*, as to a freehold depending on a term of years.

What things are said to lie in grant ?

Any estate in a tenement or hereditament not being land ; and an estate in lands not being an immediate freehold or entitling to the possession thereof (13).

NOTE.—Formerly a distinction existed, of much practical importance as to the mode of conveying estates, between things *lying in livery* and things *lying in grant* : the former class comprehended land in possession, and also certain legal aggregates, of which lands in possession formed the principal part, such as a manor (21 L. Tim. Rep. 42 ; 22 L. Tim. Rep. 322), consisting of lands and seignories, or a rectory consisting of lands and tithes (Gardiner v. Williamson, 2 B. and Ad. 336 ; Bird v. Higginson, 2 Ad. and Ell. 696), and of these it seems that the incorporeal part, though separately grantable by deed, will not be severed from the corporeal without an apparent intention ; and, therefore, a feoffment of the whole, if not completed by livery of seisin, will not have a partial operation as a grant, without the deed also contained the word “ grant,” and could have the operation of a grant (see Littleton, p. 20 ; *and*, pp. 123, 124 ; Moore, 496). To the latter class of things, *vis.*, lying in grant, belonged all the subjects of real property, which are alienable, except

formerly land in possession (*Thomas v. Fredericks*, 18 Qx. Ben. Rep. 775). But now as we have seen by the 8 & 9 Vict. c. 106, s. 2, the immediate freeholds of lands now lie in grant, so that the old distinction is, as to the mode of conveyance, become of less importance. The reversion expectant upon a lease for years lies in grant, but it lies also in livery (*Doe v. Lynes*, 3 B. and C. 388); for a feoffment may be made of it with the consent of the tenant (Coke's Litt. 48 b., 52 a.); and as this consent was equally necessary by the old law, to the validity of a grant, it is difficult to say which was the more appropriate mode of conveyance. Such a reversion, however, appears in general to possess the properties of a thing lying in livery rather than in grant (Coke's Litt. 332, b.).

How are hereditaments distributed?

Into corporeal and incorporeal hereditaments (14).

Is land a corporeal hereditament?

Yes (14).

What kind of hereditament is a reversion?

It is an incorporeal hereditament; for the owner of the reversion has not the land, but merely an estate in the land (14).

What things are called incorporeal hereditaments?

All tenements and hereditaments which are not land, and which are held by some one for an estate of inheritance, are incorporeal hereditaments, and this is so as to tenements which issue out of and are collateral to land, as rents, commons, &c. (14). And also, as we have just seen, a reversion.

What other division is there of hereditaments?

Into hereditaments real and hereditaments personal (14).

NOTE.—Here Mr. Preston speaks of hereditament as not confined to property of a real nature, but as embracing both real and personal estate. He does not thereby lay himself open to the objection stated, *ante*, p. 223; for Mr. Just. Blackstone's statement was, that real property comprised lands, tenements, and hereditaments: he would have been more nearly correct had he said that it comprised lands, tenements, and *some* kinds of hereditaments.

How are those incorporeal hereditaments, which are also tenements, said to lie?

1. In *prendre*, as commons; 2. In *vendre*, as rents (15). This denomination is taken from the manner in which the right conferred is to be taken, exercised, or enjoyed (15).

Why is the right of common of pasture said to lie in *prendre*?

Because such right gives to some other person than the owner of the soil, the privilege of taking the herbage of the soil, by the mouth of his cattle, in common with the owner of the soil (15).

Why is the right to a rent said to lie in *vendre*?

Because it is incumbent on some other person to render money, or some valuable thing in lieu of money (15).

On what does the question of a good or bad title depend?

On the mode in which the title is derived; as by rightful conveyance or by descent on the one hand, or by wrongful alienation on the other hand (15, 16).

On what may it depend, that a title once bad is become good?

On a bar to the person in whom the title formerly resided, as the statute of limitations, the destruction of contingent remainders (prior to the 8 & 9 Vict. c. 106, s. 8, which only applies to the destruction of the prior estate, and not to its natural determination) or a release (16).

From whom is a title thus established to be deduced?

From the original and rightful owner; for unless there was a good title in him against whom the bar of the statute, the destruction of the remainder, or the release, &c. is to be applied, the bar may not be positive and absolute; but titles of entry or rights of action may be subsisting [in other persons], some of whom may have been under disabilities, whereby their rights are saved (16).

What is necessary to be shown where a title depends upon a bar by the Statute of Limitations?

To whom the estate formerly belonged, so that it may be seen that the bar has defeated the right of all parties (16). It should also be shown that the parties were living when the time of the alleged period of bar commenced, and that they were then free from the disabilities of infancy, coverture, absence beyond seas, idiosyncy, and imprisonment, which are exemptions from a bar by the Statute of Limitations; or that the disabilities ceased at a period sufficiently remote (16, 17).

In the case of a settlement, has the owner of each successive estate a new period for his claim?

Yes; the bar does not begin to run against the owner of each such estate till the right to the possession accrues (17).

Note.—After the Statute of Limitations has once begun to run, a party cannot, by putting his estate into settlement, raise up new rights, and give new claims to persons deriving under the settlement (*Stockpole v. Stockpole*, 4 Drn. and Warr. 320; S. C. 2 Con. and Law. 489). The general rule, established under the old Statutes of Limitations, that the reversioners have each a new period for making claim, is recognised by the modern act of the 3 & 4 Will. 4, c. 27. Thus, in sect. 3, which defines the period at which the rights of claimants shall be deemed to have accrued, it is enacted, "That, when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to

have first accrued at the time at which such estate or interest became an estate or interest in possession." Where copyholds were surrendered to a husband and his wife for both their lives, with remainder to the heirs of the husband, it was held that such a remainder was a future estate within the meaning of the 3rd section of the act (*Doe v. Liversedge*, 11 Mees. and W. 517; S. C. 13 Law Journ. N.S. Exch. 61). By the 4th section of the statute it is provided, "That when any right to make an entry or distress, or to bring an action to recover any land or rent by reason of any forfeiture or breach of condition, shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued in respect of such estate or interest, at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened." However, by section 9, where rent amounting to 20s., reserved by a lease in writing, shall have been *wrongfully* received by some person claiming title to such rent, or the land out of which it issues, no right is to accrue to the lawful claimant on the determination of the lease. Sec. 5 of the statute provides "that a right to make an entry or distress, or to bring an action to recover any land or rent, shall be deemed to have first accrued in respect of an estate or interest in reversion, at the time at which the same shall have become an estate or interest in possession, by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof, or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall, at any time previously to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in the receipt of such rent." The only object of this section was, it seems, to provide that the 4th section shall be in force, although the reversioner may have formerly been in possession, in virtue of an estate anterior to the one upon which his reversion is expectant. Such anterior estate could, of course, not have given him a right of entry for the breach mentioned in that section; but if he had another estate which did give him the right, the case would be different, for sec. 20 of the statute would then apply. The 20th section enacts that when the right of any person to an estate in possession is barred, and such person had, during the same period, a right to a future estate, such latter right shall also be barred, unless a meane remainder-man shall have recovered possession; in other words, if the period of limitation has run against a tenant for life, he can have no new right under an

ultimate reversion, unless the mesne remainder-man has recovered the possession.

Will a disability in any other person than the one to whom the right *first* accrued, under a limitation in a settlement, be of any avail to stay the operation of the Statute of Limitations?

No; a bar once beginning to run against the ancestor, continues to run not only against him, but also against his issue or heirs, notwithstanding any subsequent disability in him or them (17). See 2 Prest. Abstr. 397; Doe v. Jesson, 6 East, 80; Cotterell v. Dutton, 4 Taunt. 826.

NOTE.—Issues in tail had not, even under the old Statutes of Limitation, distinct and successive rights, any more than heirs in fee simple: the statute began to run when the title descended to the first tenant in tail (unless he was under a disability), and each succeeding tenant in tail had no right to sue during twenty years after the death of his predecessor (Tolson v. Kaye, 3 Brod. and Bing. 217; S. C. 7 Scott, N. R. 222).

If the tenant of a determinable or defeasible estate grant a rent, will it determine with the estate?

Yes, in point of title; such rent will be subject to the determinable or defeasible quality annexed to the estate in the land (17).

If tenant in tail of land grant an estate in fee simple, how long will it endure?

[If by an enrolled conveyance, to which the protector, if any, is a party, an absolute estate in fee simple will now pass; if enrolled, but the consent of the protector has not been obtained, it will endure until the failure of issue inheritable under the entail.]

In Mr. Preston's time, the estate, if not defeated by the issue in tail, as it might have been unless they were *barred* [by a recovery or fine, with proclamations, Bart. Comp. pl. 682, 698, 701], would determine on the death of the tenant in tail, and the failure of his issue inheritable to the entail (17).

What does Mr. Preston remark as peculiar in reference to the point just referred to?

That in his time the estate of a tenant in tail had the peculiar quality of admitting of an enlargement or extension into a fee simple by the operation of a common recovery. [And now, by 3 & 4 Will. 4, c. 74, s. 39, if a base fee (*i.e.*, an estate derived out of an estate tail by a conveyance to which the protector, where there is one, does not consent), and the remainder or reversion in fee simple become united in the same person, without any intervening estate, such base fee is not merged, but it becomes enlarged into an absolute fee simple.] When this enlargement is effected, all interests depending on the *estate tail* are benefited thereby; and, therefore, though the estate were, in the first instance, a determinable fee, it

became formerly, by the common recovery suffered by the tenant in tail [and now by the effect of the conveyance without the protector's consent, and the subsequent acquisition of the immediate remainder or reversion in fee], an estate in fee simple [founded in point of title on the estate tail, Noy's Max. 334, Byth. edit.]; and all estates, charges, and incumbrances, derived out of and depending for effect on the estate tail, are supported to the extent of the fee simple, under the title conferred by the estate tail, as enlarged into a fee simple (17, 18):

QUESTIONS AND ANSWERS

ON THE

NEW EQUITY PRACTICE.

[Continued from p. 134.]

JUDGES SITTING AT CHAMBERS.

We particularised, at p. 127, some of the matters disposed of at the judge's chambers, adding that some of the applications there spoken of were occasionally made to the court. We may observe that, since the directions referred to at p. 127 were made by the judges, it has been further ordered that applications under the Legacy Duty Act, for payment of money out of court (No. 6 in our statement), are to be made as before, *viz.*, by petition to the court, and *not* by summons at chambers (9 Hare's Rep. Append. 83). Applications under the Trustee Act, for payment out of court of money paid in by trustees, were also directed to be heard at chambers; but this was soon found objectionable, and those applications also are made by petition to the court (9 Hare, App. 83). With respect to No. 2, in conformity with what we have stated at p. 127, that some of the applications there mentioned as properly made at chambers, may yet be heard in court, in the case of *Thornhill v. Copleston*, an application under No. 2, *viz.*, for the appointment of a guardian to concur in a special case, was allowed to be heard in court; and, indeed, it seems that such applications are properly made in court. We may mention that in another case, which was heard by the court, and which was for the appointment of a guardian of an infant in a special claim, it was held that the affidavit in support must show, in the proposed guardian, some interest, connection, or authority, over the person of the infant, (*Foster v. Costley*,

10 Hare, App. 24; S. C. 17 Jor. 370; 22 Law Journ. N.S. Chanc. 639).

COMPUTATION OF INTEREST—APPORTIONMENT OF FUND.

Where the court directs a computation of interest or the apportionment of any fund, which is to be acted on without any further order, what should the order direct?

That such computation of interest or apportionment of the fund be made by one of the chief clerks attached to the court of the judge making such order, and also that the certificate thereof, signed by such chief clerk, be acted upon accordingly, without the same being signed and adopted by the judge (Ord. of 16th Oct. 1852, pl. 43).

CLERKS' CERTIFICATES OR REPORTS.

Where an account is directed, what is to be the form of the chief clerk's certificate?

It must state the result of such account, and not set the same out by way of schedule, but must refer to the account, verified by the affidavit filed, and specify, by the numbers attached to the items in the account, which, if any, of such items have been disallowed or varied, and to state what additions, if any, have been made by way of surcharge (Ord. of 16th Oct. 1852, pl. 44).

Where an account, verified by affidavit, has been so altered that it is necessary to have a fair transcript of the account as altered, by whom is it to be made?

By the solicitor prosecuting the order, and is then to be referred to by the certificate or report (*ibid*).

What becomes of the accounts and transcripts, and are copies to be taken thereof?

They are, if referred to by the certificate or report, to be filed therewith; no copies thereof are to be required to be taken by any party (*ibid*).

NOTE.—In the case of *Cannan v. Evans* (10 Hare, App. 1; S. C. 21 Law Tim. 124, 125), notwithstanding the 15 & 16 Vict. c. 80, and the 22nd (*ante*, p. 129), 29th (*ante*, p. 132), and the 44th (*supra*) of the Orders of the 16th Oct. 1852, the master, who had been directed to take a testator's accounts, was further directed to proceed with the account taken in by the defendant, and verified by his affidavit, without requiring a copy to be left for the use of the master, or of his chief clerk.

How are the results of proceedings before the chief clerks, on directions given by the judge, to be stated?

In the shape of a short certificate to the judge, and not to be

embodied in a formal report, unless in any case the judge shall see fit so to direct. When the judge shall approve of such certificate or report, he signs the same in testimony of his adoption thereof (15 & 16 Vict. c. 80, ss. 31, 32).

What is the form of such certificate or report by the chief clerk?

The certificate or report must not, except under special circumstances, set out the order, or any documents or evidence or reasons, but must refer to the order, documents, and evidence, or particular paragraphs thereof; so that it may appear upon what the result stated in any such certificate or report is founded (Ord. of 16th Oct. 1852, pl. 45).

How is the chief clerk's certificate to be drawn up?

When settled, it is to be transcribed by the solicitor prosecuting the proceedings, in such form and within such time as the chief clerk shall require, and is then to be signed by the chief clerk, at an adjournment to be made for that purpose. But where, from the nature of the case, the certificate can be drawn and copied in chambers, whilst the parties are present before the chief clerk, the same must be completed and signed by him without any adjournment (Ord. of 16th Oct. 1852, pl. 46).

How are objections to be taken to the certificate or report of the chief clerk?

Instead of taking exceptions, the party objecting must take the opinion of the judge upon any particular point or matter arising in the course of the proceedings, or upon the result of the whole proceeding, when it is brought by the chief clerk to a conclusion (15 & 16 Vict. c. 80, s. 33).

Can a party take the opinion of the judge upon any particular point during the proceedings before the chief clerk?

Yes; or he may wait till the proceedings are concluded (15 & 16 Vict. c. 80, s. 33).

What is the time allowed for taking the judge's opinion upon the result of the whole proceeding when concluded, prior to the judge's approval?

Four clear days after the clerk's signature to the certificate or report (Ord. of 16th Oct. 1852, pl. 47).

How is the judge's opinion to be taken?

On a summons obtained for that purpose within such four days as above mentioned (Ord. of 16th Oct. 1852, pl. 48).

Within what time and how is the judge's approval to the clerk's certificate or report to be obtained?

At the expiration of four clear days after the certificate or report is signed by the chief clerk, if no summons has in the mean time been obtained for taking the judge's opinion, the chief clerk submits the certificate or report to the judge for his approval, which is testi-

fied thus :—" Approved, this — day of —" (Ord. of 16th Oct. 1852, pl. 49).

What is done with the certificate of the clerk after the judge has signed same ?

It is transmitted by the clerk to the Report-office, and is there filed (Ord. of 16th Oct. 1852, pl. 50).

Is the certificate, when filed, binding on the parties to the suit ?

Yes, unless discharged or varied, either by motion to the court, or on a summons at chambers (c. 80, s. 34).

Within what time must an application be made to discharge or vary a certificate or report adopted by a judge ?

Within eight clear days after the filing of such certificate or report (Ord. of 16th Oct. 1852, pl. 51).

COSTS.

Will parties attending any proceeding in chambers be entitled to their costs as a matter of course ?

No ; either they must obtain the previous leave of the judge to attend, or they must have a special order of the court for the allowance of the costs (Ord. of 16th Oct. 1852, pl. 55).

Will the costs of counsel's attendance at chambers be allowed ?

Not unless the judge certifies it to be a proper case for counsel to attend (Ord. of 16th Oct. 1852).

NOTE.—The judges refuse to hear counsel at chambers ; if the matter is of sufficient importance to require an argument, it will be adjourned to be heard in court (*Dipple v. Cordes*, 22 Law Journ. N.S. Chanc. 15 ; *York Railw. Co. v. Hudson*, 17 Jur. 1090).

DEPOSIT OF DEEDS.

Where deeds or other documents are ordered to be left or deposited, where is this to be done ?

At the Record and Writ Office (Ord. of 16th Oct. 1852, pl. 57).

MOOT POINTS.

No. 67.—*Ancient Swimming Baths—Nuisance—Indecency.*

Upwards of one hundred years ago certain public open-air swimming-baths, now known as "Rennison's Baths," were constructed in the outskirts of the city of Bristol. At that time there were no houses in the vicinity of the baths, and, as the latter were surrounded by tolerably high walls, the bathers were completely screened from

the observation of the passers-by. Owing, however, to the gradual extension of the city in that direction, the baths are now surrounded by houses; some of which are so situated that any one looking out of the upper windows must necessarily have a full view of the bathers, within so short a distance, as to render the sight extremely offensive and indelicate. The baths were originally, and still are, private property, and are open to the public upon payment of a small sum.

Would a person, by bathing in the baths, but not exposing himself more than is absolutely necessary for the purpose of bathing, render himself liable to an indictment? and is the proprietor of the establishment indictable for permitting persons to bathe without proof of his bathing himself? *Quere* also, whether either the bathers or the proprietor would be liable in an action for damages at the suit of the occupiers of the adjoining houses? *Quere*, lastly, whether the Court of Chancery would interfere by injunction? and, if so, by whom should the bill be filed? LUCAS CORDEN (Newport).

No. 68.—*Tenancy by the Courtesy.*

A. is seized in fee, *jure mariti*, of lands, which descended to his wife during the coverture; and since the 3 & 4 Wm. 4. c. 106, and they have several children. Mr. Williams lays it down (*Principles of Law of Real Property*, p. 168) that, under these circumstances, the husband can never become tenant by the courtesy; "for descent," says he, "is now traced, not from the person last seized, but from the last purchaser. The issue of the wife, therefore, must trace their descent as heirs to the estate, not from the wife, but from the purchaser, and there is consequently no possibility of their ever inheriting the estate as heirs. The condition, therefore, which would entitle the husband to become tenant by the courtesy cannot be fulfilled." Mr. Macqueen, in his excellent work on Husband and Wife (p. 189), quotes, and apparently coincides in, this opinion. I, however, submit, with the greatest deference to both these learned authors, that the husband would, upon his wife's decease, still become entitled to his tenancy by the courtesy, precisely as he would have done prior to the Descent Act; for the rule alluded to by Mr. Williams is, as I take it, merely that the husband must have had issue by his wife "capable of inheriting the mother's estate" (*vide* Steph. Com. 3rd edit. vol. i. 258); and, under the supposed circumstances, I submit that the children are capable of so doing, for, although they would not inherit directly from the mother, yet, as they do still inherit the estate which formerly descended to her, I maintain that the rule in question is satisfied.

Will any of your readers favour me with their opinions upon this point? LUCAS CORDEN (Newport).

No. 69.—~~Standby~~—~~Words~~—*Imputing Incontinence.*

Supposing a gentleman, in the course of a quarrel with another in a public place, were, in the presence of the bystanders, to make use of words falsely imputing a gross want of chastity on the part of the wife or sister of the other, without having any probable ground for making such an assertion, would the law grant any redress for such an outrage?

LUCAS CORDES (Newport).

No. 70.—*Defective Execution of a Power—Relief in Equity.*

It is firmly settled that a defective execution of a power in favour of a wife, a legitimate child, or a *bona fide* purchaser, will in general be relieved against in equity; but it has been much doubted whether equity will decree such relief as against an heir-at-law, being the son of the donee of the power, and who, if such relief were granted, would be left wholly unprovided for, it being said that, in such a case, the heir-at-law has an equal equity with the party seeking relief, and that, their equities being equal, the court will not interfere, but will leave the parties to their rights at law. Is this doctrine to be considered law at the present day or not?

See *Chapman v. Gibson*, 3 Bro. C. C. 228; *Braddick v. Mattock*, 6 Madd. 363; *Rodgers v. Marshall*, 17 Ves. 294, and *Story's Equity Jurist*, 2nd edit. vol. ii. 155, in the affirmative of the above doctrine; and *Hills v. Downton*, 5 Ves. 564, in the negative. See also *Tudor and White's Equity*, L. C. vol. ii. 160.

LUCAS CORDES (Newport).

No. 71.—*Replevin by Bailee.*

A. delivered a horse to B. to be by him gratuitously shod. Whilst in B.'s possession the horse was distrained by the latter's landlord, for rent alleged to be, but not really, due.

Can B. maintain replevin for the horse? The mooter apprehends that he cannot.

LUCAS CORDES (Newport).

No. 72.—*Replevin in County Court—Appeal.*

Is the judgment of the county court judge, in an action of replevin, under any circumstances ever liable to be reviewed by the superior courts?

LUCAS CORDES (Newport).

No. 73.—*Bill of Exchange—Notice of Dishonour.*

The drawer of a bill of exchange lived at C—, and the drawee and payee respectively at D—. There was only one post daily between those places, which left D— for C— at ten a.m. The bill was presented for acceptance and dishonoured at D— at four p.m. on Monday, and the payee sent notice of dishonour to the drawer by the Wednesday's post.

Was the notice of dishonour sent sufficiently soon to charge the drawer? According to Dr. Story it was (Story's Commentaries upon Bills of Exchange, 1st edit. p. 320, *in notis*); but the mooter ventures to doubt the accuracy of that learned author's opinion.

LUCAS CORDES (Newport).

No. 74.—*Bequest to Legatee on her attaining the age of Sixty unmarried—Conditions in Restraint of Marriage.*

Testator bequeathed £5,000 to his daughter N., payable on her attaining the age of twenty-one years, and also the further sum of £10,000, to be paid her on her sixtieth birth-day, provided she remained sole and unmarried in the mean time.

N. attained the age of sixty, having, however, previously married. Is she entitled to the £10,000 legacy?

LUCAS CORDES (Newport).

No. 75.—*Power of Attorney.*

Is there any positive rule of law requiring an ordinary power of attorney—*e.g.*, a power to receive and give a discharge for a sum of money, or to bring an action in the name of the principal—to be in writing?

LUCAS CORDES (Newport).

No. 76.—*Equity Practice—Cross Bill of Discovery.*

Can it ever become necessary or expedient, under the new practice, for a defendant to file a cross bill of discovery against the plaintiff?

LUCAS CORDES (Newport).

No. 77.—*Bankruptcy—Farmer—Manufacturing Agricultural Implements—Trader.*

A farmer having invented an improved threshing machine, bought a quantity of materials from time to time, employed workmen to put them together, and, having constructed the machines, sent them for sale to tradesmen in different parts of the country, who acted as his agents for the sale of such machines, and who received a commission for their trouble. He still carried on his farming operations, which constituted his principal means of livelihood; but those means were in some years increased, and in others decreased, by the manufacture and sale of the threshing machines?

Do the above transactions render the farmer a trader within the scope of the Bankrupt Laws?

LUCAS CORDES (Newport).

No. 78.—*Devise—Perpetuity.*

Devise in 1830 to J. S. in fee, to the use of A. for life, remainder to the use of trustees, to preserve contingent remainders, remainder to the use of the first son of A. who should come into existence in

testator's lifetime, remainder to the use of trustees to preserve contingent remainders, remainder *to the use of such son's first and every other son successively in tail*, with divers remainders over.

Is the limitation in *italics* void for remoteness or not?

LUCAS CORDES (Newport).

No. 79.—*Devise—Rule in Shelley's Case.*

Devise to Mary J. for life, remainder to Thomas H. for life, remainder to Elizabeth, the wife of said Thomas H., for life, remainder to the heirs of the two bodies of the said Thomas H. and Elizabeth, his wife, lawfully begotten, or to be begotten, remainder to said Thomas H. and his heirs for ever.

What estates do Thomas H. and his wife respectively take under the above devise?

LUCAS CORDES (Newport).

No. 80.—*Action for Opening a Window, so as to Disturb Plaintiff's Privacy.*

Will an action lie for opening a window in defendant's dwelling-house, in such a manner as to overlook the premises of the plaintiff, and thereby disturb his privacy? *Vide* a remark, per Le Blanc, J., in *Chandler v. Thompson*, 3 Campb. 82.

LUCAS CORDES (Newport).

No. 81.—*Sale of Horse—Violation of Warranty.*

A. buys a mare of B., who along with her gives an ordinary warranty. About nine months after the sale she proves to be with foal. B. knew of this, but no mention was made of it at the time of the sale. A. now wants to return the mare, saying she is unfit for work. Is this a defect B. ought to have named at the time of sale? Is the acceptance compulsory on B.? I am of opinion it is not.

JUNIUS.

ANSWERS TO MOOT POINTS.;

No. 42.—*Devise over, if die before becoming entitled (antè, p. 224).*

The only question in this case is simply whether the word "entitled," is to be referred to the death of the testator, or to the death of the tenant for life; in other words, whether it means "*entitled in interest*," or "*entitled in possession*." Judged by the rules of plain common sense and grammatical construction, I think there is little doubt but that the latter interpretation would be adopted, espe-

cially as the other construction would involve the absurdity of making the ultimate gift to A. merely a substitution in the event of the testator's widow predeceasing the testator, instead of a devise to him in the event evidently contemplated by the testator, viz., the death of the widow, living the tenant for life. In *Henderson v. Kennicot*, 2 De Gex and Smale, 492, which in effect precisely resembled the present case, *Knight Bruce, V. C.*, manifested a strong inclination to adopt the latter construction, but being pressed by counsel with the cases of *The Commissioners of Charitable Contributions v. Cotter*, 1 D. and War. 498, and *Fry v. Lord Sherborn*, 3 Sim. 243, he decided to the contrary, observing, "But for the cases cited, I should probably have held the expression 'entitled,' to mean 'entitled in possession;'" but I cannot so decide without contradicting those authorities." As the law now stands, the representatives of the testator's sister-in-law and A. are, therefore, undoubtedly jointly entitled; but I cannot help remarking, that the cases by which this doctrine is established are of an extremely unsatisfactory description.

LUCAS CORDELL (Newport).

No. 26.—*Bequest, subject to Conditions in restraint of Marriage* (ante, p. 104).

No gentleman having hitherto volunteered an opinion upon this point, I, as the mooter thereof, am induced to offer a few remarks upon the subject, in the hope of eliciting some observations from gentlemen better qualified to give an opinion upon it than myself. No question, of course, arises as to the £1,000 legacy, which being absolutely and unconditionally bequeathed to M. upon her attaining twenty-one, of course became payable to her on her arriving at that age. I shall, therefore, pass at once to the consideration of her other claims under the will; but before proceeding to do so, I must remark that it is incumbent upon us to put entirely out of the question all the cases which have been decided upon devises of real estate, or of legacies charged upon land, subject to conditions in restraint of marriage, which will be found to be inapplicable to the case before us, for the following reasons. Several centuries ago, when the Ecclesiastical Courts were in full vigour, those courts were solely possessed of jurisdiction in causes relating to bequests of pure personality, and the ecclesiastical lawyers who presided in those courts decided the causes coming within their jurisdiction in accordance with the rules of the civil law, with such modifications as the exigencies of the age and the institutions of this country from time to time rendered necessary, and when in process of time the Court of Chancery acquired concurrent jurisdiction in testamentary causes, that court, to avoid the absurdity of the same bequest being construed in one court according to rules wholly at variance with those acted

upon by another court of concurrent jurisdiction, was reluctantly compelled to adapt the rules of the civil law in the adjudication of causes relating to such bequests. Inasmuch, however, as the Ecclesiastical Courts never had jurisdiction in causes relating to wills of real estate, or legacies charged upon land, the maxims of the civil law were from the earliest times disregarded in the interpretation of such wills, and in questions arising thereupon the doctrines of the common law were allowed to take their full effect. Hence it follows, that bequests of pure personality, and devises of real estate (including legacies charged upon land), are to the present day governed by different rules, coinciding it is true in some particulars, but in many other respects wholly repugnant to each other; the one class embracing the doctrines of the civil law (which, so far as they relate to conditions in restraint of marriage, are principally founded on the old Roman law, usually known as the *Lex Julia*, as amended by that called *Lex Pappia Poppæa*), with such modifications as have from time to time been found expedient; and the other, consisting of the well-known canons of our own common law.

We will now return to the consideration of the case before us.

1. As to the annuity. In the first place we must observe, that the restraint annexed to the enjoyment of the annuity is imposed by way of *condition subsequent*. Now the rules laid down by Lord Cranworth, V. C., in *re Dickson*, 1 Sim. N.S. 37; S.C. *LAW STUDENTS' MAGAZINE*, vol. iii, p. 136, as to the operation of conditions subsequent upon bequests of pure personality, will guide us in arriving at a decision upon the case before us. In that case, his Lordship lucidly lays down the law as follows:—"If the condition, being a condition subsequent, be in the class of those which impose a restraint considered by the civil law as unlawful, then, if the condition be a simple prohibition, or a prohibition with a declaration of forfeiture of the legacy, without more, the rule of the civil law prevails—*remittitur conditio*—and the legacy stands as if no condition had been found in the testament. If, on the other hand, there be something beyond a condition and clause of forfeiture, and the forfeited legacy is on breach of the condition given over, or which is the same thing, is directed to become a part of the residue, and that residue is given over, then this court disregards the doctrine of the civil law, and acts on its own ordinary rules. The legatee over becomes entitled, and the original legatee loses his legacy." Now, it is quite clear, that by the civil law *all* conditions requiring *consent* to marriage, whether such consent is required generally, without reference to the period of life at which the legatee may happen to marry, or whether such consent is merely required in case of marriage under a given age, are altogether void (*Heineccius ad legem Papiam Poppæam*, p. 294; *Digest* xxv. tit. i. cap. 72, l. 4; *Aylife* on the

Pandects, lib. iii. tit. 21, p. 374, and White and Tudor's Equity, L.C. ii. 155—162). Our case, therefore, comes within Lord Cranworth's first rule, and there being no bequest over, or declaration that the annuity shall sink into the residue, *remittitur conditio*, and M. and her husband on their marriage take the annuity discharged from the condition. (See also, *Garrett v. Pritty*, 2 Vern. 293; and *Wheeler v. Bingham*, 3 Atk. 364).

2. As to the £500 legacy. In this instance it is to be observed that, unlike the case we have been hitherto considering, marriage with consent is here made a condition *precedent* to the vesting of the legacy, and this gives the bequest a totally different complexion. Amongst the many modifications of the civil law concerning legacies which our courts have from time to time found it necessary to make, none have trenchcd more deeply upon its pristine integrity than those which have been made respecting legacies depending upon the performance of conditions precedent. By the civil law, as it existed in the days of the Roman empire, no difference whatever was made between such legacies and those liable to be defeated by the operation of conditions subsequent (*Digest, ut suprâ*, Godolphin, book i. cap. 15, and book iii. cap. 17; Swinburne on Legacies, book iv. cap. 12, p. 266; White and Tudor's Equity, L.C. ii. 155; and Story's Equity Jurispr. i. 234; and *Harvey v. Aston*, 1 Atk. 375), whilst, on the other hand, the common law draws a very marked distinction between the two, and construes the condition in the former case with much greater strictness than in the other (White and Tudor's Equity, L.C. ii. 164), and as the leaning of the courts has always been in favour of this distinction, the rules of the civil law in cases of legacies dependent upon the performance of conditions precedent have been gradually modified and encroached upon, and, at length, after many contradictory and jarring decisions, it appears now to be settled that such legacies are to be considered as "upon the same footing as any other bequests or devises at common law, that is to say, that they are to take effect only upon the condition precedent being complied with, whether there be a bequest over, or not," (Story's Equity Jurispr. ii. 234; *et vide Roper on Legacies*, i. 654—660; *Scott v. Tyler*, 2 Bro. C.C. 431; *S.C. White and Tudor's Equity*, L.C. ii. 89; *Harvey v. Aston*, 1 Atk. 361 [n.]; and *Stackpole v. Beaumont*, 3 Ves. 89), and it makes no difference whether such condition precedent be illegal, or even physically impossible; for as the subject-matter of the bequest or devise is not to vest *until* the condition is performed, it follows that if it is not performed, the estate never vests at all, whether the non-performance is occasioned by the impossibility of its performance, or by any other reason. (Steph. Com. 3rd edit. i. 290). From this it follows that, the £500 legacy being dependent upon the performance of a con-

dition precedent, viz., M.'s marriage with consent, and that condition never having been performed, she is not entitled to the legacy.

LUCAS CORDES (Newport).

No. 53.—*Promissory Note—Statute of Limitations (antè, p. 227).*

As the law does not regard the fraction of a day, the time of limitation must be considered as having begun to run in the first moment of the day upon which the note was made, and it consequently expired in the last moment of the 23rd January, 1854, and the plaint not having been entered until the following day was consequently too late. In *Russell v. Ledsam*, 14 Mees. and Wels. 574, certain letters patent for fourteen years were granted on the 26th February 1825. The question was, when did the term expire? and it was held *per totam curiam*, that it began to run on the day of the date, and expired at twelve o'clock at night on the 25th February 1839. *Parke, B.*, in delivering the judgment of the court, said, "It was asked by Mr. Kelly, whether, if there had been an imitation of the invention on the day on which the patent was dated, it would have been an infringement of it, and we have no doubt that the answer ought to be that it would; and, if so, the day of the date would be included, and the patent would expire *at midnight* on the 25th February 1839, for the law never takes notice of the fraction of a day, except when there are conflicting rights between subjects." Now, in our case, the payee might have sued upon the note on the very day upon which it was made, as no demand is necessary before bringing an action upon a note payable on demand, the service of the writ on the maker being all the demand that is necessary. (*Norton v. Ellam*, 2 Mee. and Wels. 461; and *Waters v. Earl of Thanet*, 2 Q. B. 769), and therefore our case is completely upon all fours with *Russell v. Ledsam*.

LUCAS CORDES (Newport).

No. 54.—*Statute of Limitations (antè, p. 228).*

Martindale v. Faulkner, 2 C. B. 712, and *Whitehead v. Lord*, 21 Law Journ. Exch. 239, both decide that where the items of an attorney's bill refer to business done in the progress of one continuous suit or other transaction, the statute does not begin to run against the earlier items, until the whole transaction is terminated. See also *Phillips v. Broadley*, 9 Q. B. 744; *S. C. Law Journ. Q. B. 72*; and *Inglis v. Haig*, 8 Mee. and Wels. 777.

LUCAS CORDES (Newport).

No. 60.—*Lien (antè, p. 229).*

By the expiration of the time limited by the Statutes of Limitation the debt is not discharged, although the remedy by action is gone, for those statutes "go *ad litis ordinationem* only, and not *ad*

litis decisionem" (Story's Conflict of Laws, s. 376). The creditor may, consequently, set up any lien that he has in respect of the debt, although he is precluded from maintaining an action for its recovery (Spears v. Hartly, 3 Esp. 81; Dagley v. Kentish, 2 Barn. and Adolph. 411; Addison on Contracts, 3rd edit. vol. ii. 1328—1335). In Bull v. Faulkner, 2 De Gex and Smale, 775, Knight Bruce, V. C., remarked that a solicitor's lien for costs was a dormant security, and differed in that respect from a mortgage.

LUCAS CORDES (Newport).

No. 62.—*Lien* (*anté*, p. 229).

In some neighbourhoods fullers have been held, in accordance with the proved usage of the trade in the particular locality, to have a general lien upon goods sent to them to be bleached; and in other places, where no such usage has been shown to exist, they have been held to have only a particular lien (Addison upon Contracts, 3rd edit. vol. ii. 1298—9). It will, therefore, be a question of evidence for the jury whether, in the particular neighbourhood in question, fullers have by custom a general lien or not. It must, however, be remembered that although general liens were formerly encouraged as being for the convenience of commerce, yet that their extension is now looked upon with jealousy, and is discouraged, as being an encroachment upon the common law; and, therefore, if reliance be placed upon such a custom, the party setting it up will be put to strict proof of its existence. *Vide* the judgment of Lord Ellenborough, in Rushforth v. Hadfield, 7 East, 229, in which the law of general lien by the custom of particular trades is very carefully reviewed.

LUCAS CORDES (Newport).

No. 56.—*Retainer by Executor* (*anté*, p. 228).

It appears quite clear that B., by retaining his simple contract debt, to the prejudice of the specialty creditors, would be violating the established doctrine laid down for the guidance of executors in the payment of the testator's debts. See Parsons on Wills, p. 96; Toller on Exors. p. 295.

G. G. NORRIS (Nottingham).

No. 57.—*Infant—Promissory Note* (*anté*, p. 228).

Yes. He must apply, with his guardian or friend, to the county court in the district in which the defendant resides (or, by leave of the judge, he might sue him in the county court in the district in which the note was payable). On the infant applying for the summons, the guardian or friend must enter into an undertaking for payment of costs in case the infant should fail in his action (Rule 5 General Rules and Orders for Proceedings in County Courts).

A SUBSCRIBER.

No. 59.—*Attorney's Lien for Costs* (antè, p. 229).

I am of opinion that the attorney's claim is good (see Petersdorff, vol. ii. p. 659). "The court will not compel an attorney to give up *any writings in his possession* without the other party agrees to pay him his *reasonable demands*." JUNIUS.

No. 56.—*Retainer by Executor* (antè, p. 228).

I think it is quite clear that B. has no right to retain his own debt, before satisfying those of the specialty creditors; for though it is one of the privileges of an executor that he has a right to retain for his own debt, in preference to all other creditors of equal degree, yet he cannot retain as against those of a higher degree; the law places him merely in the same situation as if he had sued himself as executor and recovered his debt, which there could be no room to suppose during the existence of those of a superior order (see Williams' Exors. and Admrs. vol. ii. p. 761). J. F. C. (Walsall).

No. 59.—*Attorney's Lien for Costs* (antè, p. 229).

It has been decided (Exp. Nesbitt, 2 Sch. and Lef. 279) that a solicitor has a lien for his costs on all papers that come into his hands for the purpose of business, though not papers in the cause in which he makes the demand. I am inclined, therefore, to think B.'s claim a good one. J. F. C. (Walsall).

No. 40.—*Devise subject to Annuity—Sale of Lands* (antè, p. 224).

B. can, no doubt, sell the estate without the consent of the annuitant C.; but unless the charge of the annuity appeared on the sale, it would be a solid ground of objection to the title, as the estate would continue charged in the hands of a purchaser, B. having no right to compel C. to release his interest; for it was the very purpose of making the land a fund for the payment of the annuity that it should be a constant and subsisting fund; and, therefore, unless B. could prevail upon C. to release his interest, the purchaser might refuse to complete the purchase. (Vide Sugden's Vendors and Purchasers, vol. iii. p. 161; Hughes' Real Property, vol. i. p. 18). J. F. C. (Walsall).

No. 44.—*Policy of Insurance—Deviation—Ship in Distress* (antè, p. 225).

I find, in Chitty's Commercial and General Lawyer (p. 349), that although a deviation cannot in general be made in the voyage specified in the policy without endangering the policy, yet, where a departure is caused by necessity, or by an imperative or urgent obligation, it is not regarded as a deviation, but is excused in law; and

in the enumeration of the ordinary occasions which will justify such departure are the following:—"To join convoy, stress of weather, want of repairs, the approach of an enemy, *succouring another vessel in distress*," &c. It appears from this, then, that the deviation in the point mooted is such an one as the circumstances of the case would justify, and consequently would not avoid the policy of insurance.

J. F. C. (Walsall).

No. 43.—*Law of Shipping—Collision at Sea* (antè, p. 225).

Chitty seems to be an authority in favour of the apportionment (see p. 1038, Commercial and General Lawyer). "A misfortune of this kind may arise when both parties are to blame, as where there has been a want of due diligence on both sides; in such a case the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them."

J. F. C. (Walsall).

No. 32.—*Lessee of Mortgagor* (antè, p. 160).

In an answer to this point by W. R. W., contained in the last number of this Magazine (p. 235), he has stated that "a lease made by a mortgagor without the consent of the mortgagee, is *absolutely void, and operates as a determination of the mortgagor's estate*." May I beg the favour of being informed, either by letter or through the medium of the Magazine, of W. R. W.'s authority for such a statement?

I am much obliged to Mr. Lucas Cordes for his answer, so well supported by his stated authorities. I would at the same time suggest to the Editor, that no answer should be inserted in the Magazine unless the authorities are also given.

JOSEPH B. BETTS.

No. 56.—*Retainer by Executor* (antè, p. 228).

I agree with the mooter of this point that B., the executor, had no right to retain his simple contract debt in prejudice to those of a higher degree. The law in this case, as laid down in Steph. Com. vol. 3, p. 359 *et seq.* is, that if a person indebted to another make his creditor his executor, the law gives him a remedy for his debt by allowing him to retain so much as will pay himself, before any other creditor whose debts are of equal degree. But the executor shall not retain his own debt in prejudice to those of a higher degree, for the law only puts him in the same situation as if he had sued himself as executor and recovered his debt, which he never could be supposed to have done while debts of a higher nature subsisted.

HENRY REDDISH (Stockport).

No. 41.—*Devise on attaining twenty-one (anté, p. 224).*

The nephew's share would go to his *next of kin*, unless provision for such a contingency as in the above had been made in the will.

C. C. ELLIS (Ruthin).

No. 44.—*Policy of Insurance—Deviation—Ship in Distress (anté, p. 225).*

This point appears formerly to have been unsettled. The Court of Admiralty have expressed a doubt whether in the circumstances herein, the deviation will cause a forfeiture of the policy. The American courts have held that it is not (*The Jane*, 2 Hagg. Adm. Rep. 345; 3 Kent's Com. 16).

Now, however, it appears to be a fixed rule, that *any* deviation from the voyage marked out in the policy, *except in cases of ABSOLUTE NECESSITY* will render the insurance ineffectual, and that whether the loss be occasioned by such deviation or not, and whether the ship resume her proper course, before the loss happens, or not (*Vide Elliott v. Wilson*, 7 Bro. Parl. Cas. 459; *Davis v. Garrett*, 6 Bing. 716; 15 Law Journal (Q. B.), 274; *Ashley v. Pratt*, 16 Mee. and W. 471).

C. C. ELLIS (Ruthin).

No. 47.—*Table moving—Pretended Satanic Agency (anté, p. 226).*

There can be no doubt, but that an indictment would lie against the parties named in the above. For by 5 Geo. 4, c. 83, s. 4, "Persons using any subtle craft, means, or device to deceive her Majesty's subjects are to be deemed rogues and vagabonds, and to be punished with imprisonment and hard labour."

C. C. ELLIS (Ruthin).

No. 48.—*Master and Servant—Dismissal of Servant for Misconduct (anté, p. 226).*

I think that the master here waived his right of immediate dismissal. For if he did not discharge the servant forthwith for a greater fault, how could he for a less? The servant is certainly entitled to his wages up to the very day of the month's notice, and he would have been so had his master dismissed him on the spot (*Stephen's Com.* 3rd edit. vol. 2, p. 232).

The master in waiving his right of immediate dismissal, and by giving a month's notice also waived his right of retaining the month's wages, so that I think the servant could claim a month's pay from the day of the month's notice. As to the master's *motives* for retaining the servant, I do not think they would alter the case.

C. C. ELLIS (Ruthin).

No. 49.—*Accord and Satisfaction*—*Vingt-et-un* (ante, p. 226).

I think we can hardly call this "accord and satisfaction," as both the parties were engaged in an unlawful act (18 Geo. 2, c. 34).

I think, however, that B. cannot recover the £15 from A. upon the I. O. U., as it must be shown for what the money was due, for no I. O. U. can be paid, or rather sued upon, unless proof of *consideration* be given, which in this case would at once show the debt to be illegal.

I consider that A. can recover the £100 due to him, as if no such transaction as mentioned in the above had taken place. For even if A. and B. had entered into an agreement that the debt should be either increased or lessened (as it might happen) by the chances of the game, such an agreement, as it regarded an unlawful act, would be invalid. So that considering all things, I think the £100 would be in no way influenced by the gaming transaction. I have no authority upon the above subject, but merely state my own opinion.

C. C. ELLIS (Ruthin).

No. 51.—*Law of Evidence*—*Proof of Postmarks* (ante, p. 227).

The postmark on a letter, is usually considered to prove itself: but if disputed it does not appear clear whether the person who stamped it must be called, or whether it must be proved by *any* postmaster, or by any one in the habit of receiving letters by post; or, indeed, whether it requires any proof at all (Kent v. Lawen, 1 Camp. 178; Arcangelo v. Thomson, 2 Camp. 620; Fletcher v. Braddyll, 3 Stark. 64; R. v. Watson, 1 Camp. 215).

In Plumer's case (R. and R. C. C. 264), the postmark was proved by a stamper at the post-office.

In case of a postmark being disputed, I should imagine that the "onus" of the proof lies with the party disputing, i.e., it would be for him to prove the postmark wrong or forged, as the case might be, and not for the other party to prove it; for until it be shown to be wrong by parol evidence of the real date of posting, the law will presume it to be correct (Stocken v. Collin, 7 M. and W. 515).

C. C. ELLIS (Ruthin).

No. 62.—*Lien* (ante, p. 229).

B. had in this case waived his *particular* lien upon A.'s goods, in consequence of his not having insisted upon it, when the goods were demanded from him (Boardman v. Sill, 1 Camp. 410).

A general lien, being against the ordinary course of law, depends entirely upon contract, either express or implied from the special usage of a particular trade, or from the previous course of dealing between the parties. A general lien may be proved, also, by the dealings of other parties, engaged in the same employment, of such

notoriety as that they may fairly be presumed to be known to the owner of the goods (*Rushworth v. Hadfield*, 7 East, 228; *Cumpston v. Haigh*, 2 New Ca. 449). So that upon these circumstances depends B.'s lien upon A.'s goods.

I am inclined to think B.'s lien a good one, as in the cases of factors, warehousemen, and some others, usage has fully established the right of general lien, and with regard to dyers a lien for the general balance has been established in several cases (*Savil v. Barchard*, 4 Esp. 53; *Humphreys v. Partridge*, Montague, Bank. Law, 18; *Rose v. Hart*, 8 Taunt. 499). C. C. ELLIS (Ruthin).

No. 63.—*Liability of Retired Partners* (*ante*, p. 229).

In this case, although no deed of partnership had ever been entered into, still that does not free the partners from public liability, if the concern had been carried on in their several and respective names.

Since then the parties stood in exactly the same position to the public as if they had been real partners, i.e., bound by agreement, and no notice whatever had been given of the dissolution of partnership, I apprehend, the retired partners would be equally liable with the others (*Graham v. Hope*, Peake, 154; *Barfoot v. Goodal*, 3 Camp. 149; *Williams v. Keats*, 2 Stark. 290; *Parkins v. Carruthers*, 3 Esp. 248). C. C. ELLIS (Ruthin).

No. 64.—*Barrister's Privilege from Arrest* (*ante*, p. 230).

A barrister is privileged from arrest in civil cases while attending the courts "*eundo, morando, et redeundo*", (*Luntley v. Nathaniel*, 2 Dowl. P.C. 51; *Whalley v. Pepper*, 7 Car. and P. 514). Such being the case, I think that a barrister is privileged, whether previously retained or not. C. C. ELLIS (Ruthin).

No. 40.—*Devise subject to Annuity—Sale of Lands* (*ante*, p. 224).

B. can no doubt sell the estate without the annuitant's consent, subject to the annuity remaining a charge upon the property.

C. F.

No. 41.—*Devise on attaining twenty-one* (*ante*, p. 224).

The portion of real property given to the nephew who died under twenty-one without leaving lawful issue, would descend on that event to A.'s heir-at-law. As to which A. would be considered as having died intestate; the personal property being distributable amongst A.'s representatives according to the Statute of Distributions. C. F.

No. 42.—*Devise over if die before becoming entitled* (*ante*, p. 224).

A. alone appears to me entitled to the property devised by this

will. Testator vested the whole of his estate in trustees upon certain trusts in the first place during the natural life of his wife, and from and immediately after her decease upon certain other trusts mentioned. It is clear then, that no other party but testator's widow could become entitled under this will to participate in testator's property previous to her death, consequently testator's sister-in-law could not, and dying as she did *before* the widow, died "before she became entitled to such share of the said trust moneys and premises," as is specially provided for in testator's will. C. F.

No. 53.—Promissory Note—Statute of Limitations (*ante*, p. 227).

I think the plaint was entered in time to save the Statute of Limitations. The rule being, I presume, that in the computation of time, the day upon which an act has been performed is excluded, and the day upon which the period limited expires is included. So that in this case the plaintiff's right of action would have expired with the 24th January, 1854. C. F.

No. 56.—Retainer by Executors (*ante*, p. 228).

B. was wrong in retaining his simple contract debt until the *specialty* creditors were fully satisfied. B. stands in no better position as executor than the rest of the creditors of equal degree, the law allowing him to pay himself in preference to *them*—merely to avoid the absurdity of a man suing himself (Stephen's Com. vol. ii. p. 204).

C. F. (Appleby).

No. 58.—Guardian and Ward (*ante*, p. 228).

A. was not justified in appropriating the damages recovered by this trespass to his own use; but he must account to his ward for the amount he so recovers (Stephen's Com. vol. iii. p. 534).

C. F.

No. 59.—Attorney's Lien for Costs (*ante*, p. 229).

B.'s claim is a good one. Usage has established the right in the case of attorneys and others of a general lien in respect of the documents or goods committed to their charge (Steph. Com. vol. ii. pp. 76, 77).

C. F.

No. 53.—Promissory Note—Statute of Limitations (*ante*, p. 227).

I think there can be no doubt, that the plaint was not entered in time to save the Statute of Limitations.

The sixth year would terminate at twelve o'clock on the night of the 23rd January, 1854, consequently B.'s right to recover at the time he entered the plaint had ceased, inasmuch, as the seventh year had commenced at the time of such entry.

X. Y. Z.

No. 65.—*Estate Tail—Conveyance not enrolled (ante, p. 230).*

The mooter does not state whether or not the husband of B. joined in the conveyance by his wife to her illegitimate son, also whether she was examined separately, and the deed acknowledged by her, which was necessary.

The deed executed by B. in favour of her illegitimate son not having been enrolled would, I conceive, be inoperative under 3 & 4 W. 4, c. 74, s. 41, and her share would therefore revert to the heirs of the testator, who appear to be A. and C.

Lawful issue having been born on the body of B. her husband's curtesy would attach, and I think that he (if living) and the eldest son of A. and C. and her husband and their eldest son may execute a conveyance to a purchaser, which must be enrolled in pursuance of the statute above named.

"Lxx."

No. 23.—*Tenancy in Common, &c. (ante, p. 103).*

I think with Mr. Cordes, that in this case the grantees would take as joint tenants. "Junius" is quite right that the words "equally to be divided," would in the case of a devise, or in a conveyance founded on the Statute of Uses, create a tenancy in common. But in Stephen's Comm. vol. i. p. 333, it is said that an estate given to A. and B. *equally to be divided* between them, has been held to create a joint tenancy in *common law conveyances*, for it implies no more than the law has annexed to that estate viz., divisibility.

W. R. W.

No. 64.—*Statute of Limitations (ante, p. 228).*

I think there can be little doubt but that some part of B.'s bill is barred by the statute, for where all the items of a written account are *on one side*, the circumstance of there being some items of bill within six years will not defeat the statute as to those that are of longer standing (*Cotes v. Harris*, Bul. N.P. 149).

A. H. MORTON (Louth).

No. 59.—*Attorney's Lien for Costs (ante, p. 229).*

I am of opinion that B.'s claim is a good one, for an attorney has a lien for his general balance upon all deeds and papers belonging to his client, which have come to his hands in the course of his professional practice (*Stevenson v. Blakelock*, 1 Maule and S. 535).

A. H. M.

No. 14.—*Legacies—Deficiency of undisposed of personality (ante, pp. 59, 110, 112, 162, 235).*

I have considered the further observations made by Mr. H. Mur-

ray upon this moot point, and am glad to perceive that he has been induced to retract the opinions previously expressed by him, as to the right of the pecuniary legatees to call for payment out of the leaseholds specifically bequeathed.

With regard to the question, as to whether leaseholds specifically bequeathed, *after payment of just debts and testamentary expenses*, are by these or words of similar import rendered *primarily* liable to those charges (a question which, though not strictly incident to the original point in dispute, has arisen in the course of the discussion). I must confess that the case, and more especially the conclusion, quoted by Mr. Murray from Jarman's Treatise on Wills (vol. ii. p. 600), have had the effect of causing me to somewhat doubt the soundness of the opinion I advanced in opposition to that of W. Y. P., on the point. I have consulted various works, and taken some pains to satisfy myself upon this head; but find there is a singular want of authority on the point, and have not been able to arrive at a satisfactory conclusion. The reason why I did not adduce any cases or authorities in support of the view I previously expressed on the subject, but, as remarked by Mr. Murray, gave a mere opinion, was simply that I had been unable to find any, and I am obliged to him for his reference, but still I do not think it by any means conclusive, as Jarman himself merely says that the conclusion he draws seems upon the whole to be more reasonable than the contrary one, although in opposition to the earlier cases cited by him. I am inclined to attach the less weight to the case of Choat v. Yeates, as also to the case of Browne v. Groombridge, 4 Madd. 495 (on which two cases Jarman entirely founds his conclusion), as authorities upon the present point, from the circumstance that in *both* those cases the property which was held to be rendered primarily liable by similar words, consisted, not of leaseholds, but of *moneys, securities, and funded property*. And the importance of this observation is increased by what Jarman himself remarks at p. 598, where, in introducing the subject, he states that it should seem that when a specific portion of *PERSONAL* estate is appropriated to charges to which the general *PERSONALTY* is liable, such fund is not, *as in the case of land*, subsidiary only, but is primarily applicable; thus drawing an evident distinction between cases of *pure personality* and land.

I must now advert to a feature in the case which has apparently escaped previous attention, or at all events has not been mentioned, *viz.*, that in the case stated by the mooter the whole of testator's leaseholds are in the first place given to a trustee upon trust for testator's wife for her life, and after her decease and after all just debts and testamentary expenses are liquidated, certain leasehold property is bequeathed to testator's nephew, and the remainder is by a distinct specific bequest given to testator's nieces. Now, it cannot for a

moment be contended that the testator intended by the words referring to his just debts and testamentary expenses, to charge them upon the life interest previously given to his wife; and I think the improbability of its being his intention to charge them upon the nephew's interest in remainder (which would render necessary a sale or mortgage of such interest), would be quite sufficient to rebut any implication of an intention that such interest in remainder should be primarily liable to their payment.

With respect to the opinion given by Mr. Murray (in opposition to that of W. Y. P. and of the mooter), that the executor was *wrong* in paying the funeral expenses out of the proceeds arising from the sale of the furniture, &c., it has somewhat surprised me, as there is no lack of authority to show that the reasonable funeral expenses are to be allowed out of the *goods* of the deceased before any other debt or duty whatever, even though due to the Crown, as to which I beg to refer him to Alnutt on the Practice of Wills, p. 285; and, indeed, in the present case it would be peculiarly absurd to contend that the executor must look to a mere estate in remainder in leaseholds to realise his testator's funeral expenses, having at the same time assets available for that purpose in his possession.

STUDENS.

No. 43.—*Law of Shipping—Collision at Sea* (ante, 225).

ERRATUM.—For “The Woodress Sims,” read “The Woodrop Sims,” 2 Dodson, 83—85. LUCAS CORNES (Newport).

DEBATING SOCIETIES.

LAW STUDENTS' DEBATING SOCIETY.

(At the Law Institution, Chancery-lane.)

QUESTIONS FOR DISCUSSION.

May 2nd. No. 122. Are sureties discharged by a deed covenanting to give time to the principal debtor, but expressly reserving all remedies against the sureties, and power to sue the debtor on the application of the sureties, notice of the deed being immediately given to the sureties, who remain passive? (Owen v. Homan, 3 Mac. N. and G. 400, and 13 Beav. 196). Affirmative—Mr. Lawrence and Mr. Jennings. Negative—Mr. Emanuel and Mr. H. J. Smith.

May 9th. No. 123. A., a boarding-house keeper at Dover, con-

tracts to board and lodge B. by the week, B. having the sole use of a bed room, and the use of dining and sitting rooms, and servants, in common with other boarders. Is A. subject to the liabilities of an innkeeper in respect of the goods of B. stolen from the house during the continuance of the contract? (*Richmond v. Smith*, 8 B. and C. 11; *Burgess v. Clements*, 4 M. and S. 310; *Thompson v. Lacy*, 3 B. and Ald. 283). Affirmative—Mr. Fowler and Mr. Walter. Negative—Mr. Booth and Mr. Hill.

May 16th, No. 74. Is it desirable to raise the expenses of the present war by direct, rather than indirect, taxation? Mr. Church is appointed to open the debate, and Messrs. Rhodes, Walters, and Cooke, to speak upon the question.

May 23rd, No. 124. Can a bond creditor, after the condition is forfeited, insist upon six months' notice before he is paid off? (2 Selwyn's *Nisi Prius*, 587; *Player v. Danby*, 10 Mod. 26). Affirmative—Mr. Mossup and Mr. Roberts. Negative—Mr. Cheate and Mr. Lewis.

May 30th, No. 125. Can a servant wrongfully discharged wait until the end of his time of service, and then sue his master for the wages which would have become due to him during such term? (*Gandell v. Pontigny*, 1 Stark. 198, 4 Camp. 375; *Collins v. Price*, 5 Bing. 132, Law J. R. 1828, C. P. 241; *Smith v. Hayward*, 7 A. and E. 544, 7 Law J. R., N.S., Q. B. 3; *Fewings v. Tisdal*, 1 Exch. 295, 17 Law J. R., N.S., Exch. 18; *Elderton v. Emmens*, 6 C. B. 160, 17 Law J. R., N.S., C. P. 307; *Goodman v. Pocock*, 15 Q. B. 576, 19 Law J. R., N.S., Q. B. 411; *Down v. Pinto*, 23 Law J. R. Exch. 103. Affirmative—Mr. Maude and Mr. Reade. Negative—Mr. Hillyer and Mr. Hanbury.

W. C. BOMPAS, Secretary.

BIRMINGHAM LAW STUDENTS' SOCIETY.

At the meeting held on the 15th of March, 1854, the following moot point was discussed:—

“Is an infant husband liable, during the joint lives of himself and his wife, for her debts contracted before her marriage?”

There are only two cases directly bearing on this question—the first is *Turner v. Trisby* (1 Stra. 168), where Pratt, C.J., is reported to have said at *Nisi Prius* that “necessaries for an infant's wife are necessaries for him; but if provided in order for the marriage, he is not chargeable, though she uses them;” and the other is *Paris v. Stroud* (Barnes, 95), which seems to be a contrary decision. The authority of the latter case was denied, because “much indifferent law is to be found in Barnes's Notes (per Pollock, C.B., L. J., 1853, Ex. 285), and also because it does not clearly appear from the report whether the debt was contracted before or after marriage. It was

likewise argued that the case of *Turner v. Trisby* was not only unaffected by any more recent decision, but was also in conformity with the general principle of law, that an infant is only liable for necessities, and that the maxim, *persona conjuncta interesse proprio equiparatur*, only applied when the relation of marriage was constituted, and could not occasion a liability on account of a pre-existing contract.

In the affirmative, it was contended that the reason why a husband of full age is held liable during the coverture to his wife's debts contracted before the marriage, viz., that by the marriage he becomes possessed of the wife's personal estate, which is the primary fund for the payment of such debts—applies with equal force to the case of an infant husband, who likewise becomes possessed of *his* wife's personal estate, and having the like benefit ought to bear the like burden. Moreover, the wife of an infant husband is as much protected by the marriage from being sued alone as the wife of a husband of full age; and granting that if the wife were of age her debts might include other things than mere necessities, and thus involve the husband in a liability on account of his wife which the law protects him from on his own account, yet, as either the creditors or the husband must suffer, the maxim "that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it" (2 T. R. 10), would apply in favour of the creditors, and against the infant husband, who, by marrying, enables his wife to shelter herself from her sole liabilities.

The case of *Chapple v. Cooper* (13 M. and W. 252), was cited to show that the modern application of the maxim *persona conjuncta* is not confined only to liabilities contracted during the existence of the marriage relation, and as in that case it was extended to fix a liability arising out of the marriage contract after the contract had determined—so when the relation was constituted, it would operate to draw upon the husband the pre-existing liabilities of the wife. The meeting decided in the negative.

G. J. JOHNSON, Cor. Sec., *pro. tem.*

At the meeting held on the 29th March, 1854, the following moot point was discussed:—

"A. grants a lease to B., stipulating that it shall become void on breach of a certain condition. The condition is broken. Is A. precluded by receipt of rent after the breach, and with that knowledge of it, from treating the lease as determined?"

It was admitted on both sides to be settled law, that where the lease is not to determine until some act is done by the lessor, as entry, such a receipt of rent as that supposed in the moot point

would be a waiver of the breach ; and an election to continue the lease. It was also admitted that there are many authorities to be found in support of the distinction taken in Co. Litt. 214, b., that " where the estate or lease is *ipso facto* void by the condition or limitation, no acceptance of rent after can make it to have a continuance ;" and the debate turned principally on the question, whether these authorities, unquestionably numerous and unequivocal, have not been virtually over-ruled by the more modern decisions.

The distinction just cited, makes the determination of the lease to be an immediate, necessary, and inevitable consequence of the breach, which, it was argued in the affirmative, is consistent with Read v. Farr (6 M. and S. 121), subsequently confirmed by Doe v. Banks (4 B. and Ald. 401), where it was held that the *lessee* could not treat the lease as determined on breach of condition ; and, although these cases were decided upon the maxim that the lessee should not take advantage of his own wrong, yet they clearly establish that the determination of the lease is not an inevitable consequence of the breach. Whatever may be the force of the objection to the two last cases, it certainly does not apply to the observations of Lord Tenterden, in the later case of Arneby v. Woodward (6 B. and C. 523), where he expressed an opinion that if the lease had been provided to be utterly void on breach, the landlord could not, after such a receipt of rent as that supposed in the question, insist upon a forfeiture previously committed ; and this opinion is confirmed by the subsequent case of Roberts v. Davey (4 B. and A. 664). There, to an action of trespass, the defendant pleaded a license from the previous owner of the fee, and the plaintiff replied that the license was to be *utterly void* on breach of a condition, which had been broken. On demurrer it was held that the replication was bad, inasmuch as it did not show that the licensor had signified an option to determine the license. This case is, it is believed, the latest direct authority on the point ; and it establishes that the strongest words that can be made use of still leave a right of election in the lessor, and if he has an election the lease is only voidable, and may be set up by receipt of rent afterwards accruing due.

It was further contended in the negative that there was an analogy between the case supposed and that of a lease by a tenant for life, which, becoming void by his death, could not not be set up by any subsequent receipt of rent by the remainderman. To this it was replied, that by a principle of law the lease is void *ab initio* as against the remainderman, and therefore it is that the act of the parties is not sufficient to set it up. The point was decided in the affirmative.

G. J. JOHNSON, Cor. Sec., *pro. tem.*

ADDRESS TO OUR READERS.

For some time past we have been importuned to publish a number *fortnightly* instead of monthly, and some of our subscribers have even offered to pay any additional sum we might think proper to charge on this account. It has been said, with apparent truth, that a month is too great an interval, and that the reader cannot be expected to feel so great an interest in the publication as if it appeared fortnightly. As we are always glad of suggestions, so we invariably give them consideration, though it frequently happens that we cannot, for one reason or another, avail ourselves of them. We have, accordingly, taken the suggestions above referred to into consideration, and we are now disposed to adopt, and even to go far beyond them. For we intend not only to issue *two* numbers a month, but to *more than double the quantity of matter*. We have long felt that the limits of the publication were too small, and we became more sensible of this when making arrangements for a fortnightly issue. The way in which we propose to effect the increase in quantity, is, by having a larger sized page, with two columns, instead of the present small page, each column to contain more matter than we formerly inserted in a page, so that though the number of pages will remain exactly as before, yet, in fact, the quantity will, as already stated, be more than doubled. The size of the work will still be a very convenient one for binding, and it will always retain the appearance of an ordinary law work. We suppose there can be no possible objection to this alteration on the part of our subscribers, who will have all the additional benefit obtainable by a more frequent issue, and by so great an increase in quantity. The subscription at present is 19s., paid in advance, and one guinea if not so paid. In point of fact, few of our subscribers have hitherto paid in advance, but it is very desirable that such a mode of payment should be generally adopted. We propose, therefore, that the subscription for the future shall be £1, and be *payable in advance*. Hitherto we have been rather willing to receive the subscription half-yearly, but hereafter we shall be glad to have it paid *annually* (as being less trouble than half-yearly accounts with so many different parties), though this will be optional with our subscribers. In order to get into the way of *prepayment* (and when once adopted it is as satisfactory to subscribers as to us), we shall charge £1. 2s. to those subscribers who do not prepay.

We have another announcement to make in connexion with the above fortnightly issue and increase of size, which may, perhaps,

excite some surprise, namely, we propose to *change the title of the publication*. This is a step we have taken unwillingly, and only in deference to the opinions of others. We find that many solicitors refuse to take in the publication on account of the title—they objecting to the word “Student,” and we are informed that it is objectionable in other respects. We do not, ourselves, feel the force of these objections, but as they are the opinions of *business* men, and who are, therefore, more likely to form a correct judgment in that respect than ourselves, we have yielded to their advice. After much difficulty we have fixed upon the title of

“THE LAW CHRONICLE,”

and, for the future, the Magazine will be published under that title. Our subscribers will soon get used, and we trust reconciled, to the new name.

In making all these changes, particularly in so greatly increasing the quantity of matter, we have in view to make the publication more practical than heretofore, without, however, in the least diminishing the space hitherto occupied by the subjects peculiarly suited for articulated clerks, or at all forgetting that in every essential point the publication will still be the Law Students’ Magazine. We find among those of our subscribers who are still clerks, that they would be better pleased to have more practical matter, and, of course, this feeling is still stronger with those who are now solicitors. And here we come upon a matter to which we have upon more than one occasion referred, and which is certainly one which has at times greatly annoyed us. We allude to the fact that so many of our subscribers, on passing their examinations, immediately cease to subscribe to our Magazine, no doubt because it is not of so practical a character as other publications; so that we only prepare our subscribers for an event which, when it takes place, deprives us of their support, which is then transferred to other publications. This process has been going on for nearly ten years, and the consequence is that our publication makes no advance; whereas, had we been able to retain the majority of our old subscribers, we should now be in a more flourishing condition than any other legal publication in existence. For it is the truth, that nearly one-third of the solicitors have been, whilst clerks, subscribers to our work, though only a comparatively small number have continued their subscription after their admission. We have before given specimens of communications received on countermanding our publication, showing the curious similarity of language used by different subscribers, and we cannot resist inserting the following, which arrived whilst we were projecting the alterations, and which, we should mention, is from an old subscriber for whom

we have a great respect, and who will not, we are sure, be offended at the publication, as we have not given his name; it as follows:—

“I wish to discontinue taking in *THE LAW STUDENTS' MAGAZINE*, with the next month's number. I beg to say I have highly approved of the manner in which it has been conducted during the years I have had it, and shall gladly recommend it to my friends, as I consider it a publication well adapted to articulated clerks, and cannot fail, if carefully read, to be of great advantage to them. I should not give it up now, but I find my altered position requires a work of another character. I shall feel obliged by your informing me the amount I am indebted for the Magazine, on receipt of which I will at once send you a P. O. order for the same.—I am, &c.

“SOUTHAMPTON.”

Every examination brings about twenty of these communications, and we think, therefore, we are justified in making some effort to prevent such frequent countermands, and we conceive that by being somewhat more practical, by means of the increased quantity, we shall for the future achieve this object, without at all sacrificing those peculiar features of the publication of which so many have hitherto been pleased to express their approbation.

It will be obvious that the alterations here mentioned will increase our expenses very greatly—they will, in fact, *more than double them*—and we shall therefore be glad to increase the number of our subscribers, and request our friends will lend us their efficient assistance in this respect. Indeed, we have looked to the prospect of an increased circulation as a means of compensating us for the increased expense, and also as having a tendency to stir up and encourage our present subscribers to carry out the Mutual Correspondence system to a greater extent than heretofore; for the larger the number of our Subscribers, so much the more likelihood is there of those portions which depend on the Subscribers themselves being carried on with the more spirit, and we believe it would not be without effect on ourselves. We have little doubt that very many former Subscribers will return to us in consequence of the alteration, and if the change should put a stop to the wholesale system of countermands after the examinations, there can be no doubt that in a short time we shall not be inferior in point of circulation to any other legal periodical.

We should state that we propose to give in each number additional room to the *DIGEST OF CASES*, to the *NOTES OF LEADING CASES*, and to commence, and regularly continue articles on the Principles and Practice of *EQUITY* and *BANKRUPTCY*, to be followed by similar articles on *Common Law*, *Criminal Law*, &c. We shall, of course, give room to the *EXAMINATION QUESTIONS* and *ANSWERS* thereto, to the *Lists of MUTUAL CORRESPONDENTS*, to *MOOT POINTS* and *ANSWERS* thereto, to the *DEBATING SOCIETIES*, and

other matters interesting to Articled Clerks. The *STATUTES* will be noticed, as also (occasionally), the progress of important bills affecting the Profession, but we shall not fill our pages (as some of our contemporaries do), with Proposed Bills, Gazettes, Court Papers, Long Discussions in Parliament, so-called Leading Articles, &c. In fact the "*LAW CHRONICLE*" will be a *practical* work of use, not merely for the moment, but also for permanent reference.

We have elsewhere noticed the complaints respecting the Answers to the Moot Points, and we had, before determining on the present alterations, written the observations which will be found in the present number, at the beginning of the Answers to Moot Points, and we must, even under our altered circumstances, adhere to them. We have also had complaints of, and objections to, the Questions appended to the Letters on Contracts, and the method of editing Preston on Estates, &c. It is said by some that the questions are useless, and by more still, that they take up space that might be better occupied. We considered the questions were approved by our readers, though we admit they occupy considerable space, and make much repetition, and indeed it is impossible to have formal questions without such being the case; we have, however, devised a plan by which the object in view may be accomplished, and all parties be satisfied, as by the new plan so much space and repetition will not be required as by the former method; it is to break up the articles into paragraphs, each of them preceded by an *italic* heading containing the pith of the paragraph, and which heading may easily be turned into a question by any one wishing to do so. This will suit those who do not care for questions, and also those who do, with the additional benefit to the latter of exercising their faculties in framing the questions, instead of mechanically adopting those framed for them.

In conclusion, we may state that the next Number (being the first Number of Vol. 7, *N. S. LAW STUDENT*, and of Vol. 1, *LAW CHRONICLE*,) will appear on the *fifteenth* of June, and the ensuing Number on the 1st of July, and the following one on the *fifteenth* of July, and so on upon the 1st and 15th of every month. We have little doubt that the Publication will be found to give even more satisfaction than hitherto, and farther, that we shall not, eventually, be losers by the alteration now made, inasmuch as a greatly increased circulation will, we venture to hope, cover the additional expense, large as it is.

Those of our readers who receive the Magazine through their booksellers, should forthwith inform them of the *alteration in the time of publication*, namely, on the 1st and 15th of each month, and also in the *Title*, which for the future will be

"THE LAW CHRONICLE."

DEBATING SOCIETIES.

BIRMINGHAM LAW STUDENTS' SOCIETY.

At the meeting held on the 10th of May, 1854, the following moot point was discussed:—

"A. purchased from B. a tree growing on B.'s land. A. directed his servant to cut down the tree, and, on being felled, it dropped upon and injured C.'s carriage. Can C. maintain an action for the injury against B.?"

Most persons, on reading the question for the first time, will think that justice and common sense are both in favour of A.'s liability, and will be surprised to learn that there are cases to be found the principles of which would render B. liable. The authority most commonly cited on this question is *Bush v. Steinman*, 1 Bos. and P. 404, in which the defendant, the owner of a house under repair, had to make good the damage caused by lime placed in the road by the servant of a lime-burner, who was employed by a brick-layer, who was employed by a carpenter, who was employed by a surveyor, with whom alone the defendant had contracted for the repairs. The principle on which this decision proceeded was stated by Littledale, J., in the case of *Laugher v. Pointer*, 5 B. and C. 560, to be, "that in all cases *where a man is in possession of fixed property*, he must take care that his property is so used and managed that other persons are not injured, and that whether his property be managed by his own immediate servants, or by contractors or their servants. The injuries done upon land or buildings are in the nature of nuisances, for which the occupier ought to be chargeable when occasioned by any acts of persons whom he brings on the premises." This principle has since undergone much discussion, and it appears clear that the later authorities restrict the liability of the occupier of fixed property for the acts of contractors and their servants to those cases in which he has sanctioned the acts complained of, or in which the acts themselves come within the definition of nuisances. Also that it is not every injury done upon land or buildings which will be considered as a nuisance, so as to affect the occupier with liability. The Court of Queen's Bench, in *Allen v. Hayward*, 7 Q. B. 760, held the contractor himself liable for damage caused by the negligence of his workmen; and this principle was not only followed by the Court of Exchequer, in *Reedie v. London and N. W. Railway Co.*, 4 Exch. 244, but it was further added that a single act of negligence would not be such a nuisance as would shift the liability from the contractor to the occupier. The principle so adopted by two of the superior courts has been subsequently recognised by the Common-

Pleas, in the cases of *Overton v. Freeman*, *Cuthbertson v. Parsons*, and *Peachy v. Rowland*, and may now, therefore, be considered as settled. Applying this principle to the moot point, it clearly exonerates B., inasmuch as he does not cause the damage complained of, and, being a single act of negligence, it does not become such a nuisance as to render him liable. Again, all the cases in which contractors have been held liable as the authors of the damage, go to fix A. with the liability. It was remarked, in the course of the discussion, that, even if the law was now as laid down in *Laugher v. Pointer*, it would be a question whether A. would not even then be liable, inasmuch as a sale of a tree with power to enter on the land to fell it, as supposed in the moot point, would be a sale of an interest in land (*Chitty on Contracts*, 4th edit. p. 270, and cases there cited). During the cutting down of the tree, therefore, A. would be the occupier of the land on which or from which the injury proceeded, and therefore liable.

The point was unanimously decided in the negative.

G. J. JOHNSON, Cor. Sec., *pro tem*.

The society has been favoured with a communication from Mr. Buneby, of Stalybridge, that the decision arrived at, on the point discussed on the 29th March, and reported in the last number, is confirmed by *Doe v. Rees*, L. J. 1838, C. P. 184, which seems to have been overlooked by most writers on the subject.

LAW STUDENTS' MUTUAL CORRESPONDING SOCIETY.

(Established at Norwich, April, 1853.)

FIRST ANNUAL REPORT.

The committee, in presenting to the members this, their first annual report of the proceedings and progress of the society, have great pleasure in being enabled to congratulate them upon the permanent establishment of an organised system of intercommunication amongst articulated clerks.

Your committee feel that, to enumerate the many advantages accruing to the law student from mutual intercourse with his fellows, would be quite an act of supererogation; but, nevertheless, they would urge upon all the consideration of those advantages which they regret have at present received so little attention at the hands of the junior members of the Profession.

Your committee deem it advisable briefly to advert to the distinguishing features and objects of this society, in the hope of attracting the attention of those articulated clerks who are not at present aware of its existence. It is designed, first, as a means of friendly intercourse, and for the purpose of engendering feelings of unanimity and friendship amongst articulated clerks; secondly, to supply the wants of a

debating society in small towns, by affording a medium for the written discussion of moot points, and the composition of essays; and, thirdly, by the same means, to furnish opportunities to the student to apply principles to practice, and thus assist him in obtaining a *practical* knowledge of his profession.

It affords much satisfaction to your committee to state that the society now numbers upwards of thirty members, but still, considering the number of law students in the kingdom, they cannot but feel some surprise that so few should as yet have joined the society; but as they hope that this has arisen chiefly from ignorance on the part of the Profession, either of the existence or objects of the society, they trust, by the publication of this report, to bring the society more generally before that numerous body for whose benefit it has been established, and that this increased publicity may be followed by a considerable and speedy accession of members.

With regard to the financial position of the society, your committee have to report—That finding it impossible to carry on the society with the revenue arising from the subscriptions originally proposed, they have found it necessary to call upon each of its members for the payment of an annual subscription of two shillings and sixpence, in addition to an entrance-fee of two shillings and sixpence payable on admission.

Your committee, with a view of adding to the stability and importance of the society, recommend that it should not be confined exclusively to articulated clerks, as they consider that the interests of the society would be materially consulted if solicitors could be induced to give it their countenance and co-operation, by becoming *honorary* or ordinary members; and, in furtherance of so desirable an object, propose that solicitors be invited to become *honorary* members upon payment of a donation of half-a-guinea, or an annual subscription of five shillings, or ordinary members upon the same terms as the other members of the society.

Your committee cannot neglect this opportunity of expressing their thanks to the editors of the *LAW STUDENTS' MAGAZINE*, for the kind and friendly manner in which they have, at all times, assisted them with their advice; and also for gratuitously inserting the papers of the society in the Magazine. The editor of the *Law Times* is also entitled to the thanks of the society, for the insertion of the letters which have been written to him by your secretary.

The following members have been elected as the committee for the ensuing year :—

Messrs. J. N. Mourilyan, jun.; W. T. Pears; Henry Druce;
and Lucas Cordes.

CHARLES R. GILMAN, Hon. Sec.

St. Giles's-street, Norwich, April 9, 1854.

Gentlemen wishing to become members, are requested to commu-

nicate with the secretary, of whom copies of the rules, with full information of the plan of working, may be obtained.

MOOT POINTS IN COURSE OF DISCUSSION.

No. 90.—Is it necessary that the wife of a vendor, married previously to the passing of the New Dower Act, should join in a conveyance for the purpose of releasing her dower, where there is an attendant term created previously to her right of dower attaching?

No. 91.—If A. be possessed of property to uses to bar dower, viz.: "Unto the said A. and his heirs, to the use of the said A. and his assigns during the term of his natural life, without impeachment of waste, and after the determination of that estate by *forfeiture* or otherwise in his lifetime, to the use of B., his executors and administrators during the natural life of the said A., in trust, nevertheless, for the said A. and his assigns, and after the determination of that estate, to the use of the said A., his heirs and assigns for ever.—In case A. were convicted of felony, by which his property would be liable to confiscation, would the above uses protect it?

No. 96.—By 9 & 10 Vic., c. 95, sec. 3, it is enacted that the new county courts, established by that statute, should have all the jurisdiction and power of the ancient county courts for the recovery of debts and demands, as altered by that statute. Now the ancient county courts had jurisdiction to hold plea by writ of *justicies*, in any personal actions, for the recovery of any debt or demand of any amount whatever, so that it ~~exceeded~~ 40s. (Com. Dig., c. 5). There appears to be nothing in any of the County Courts Acts to take away this jurisdiction, and it is singular it is not frequently resorted to.

Can any of the members of this section refer to any case in which actions have been brought in the new county courts by writ of *justicies*, or in which any one of the common law powers of the ancient county courts were exercised?

The secretary will be glad to receive communications from any reader upon this point.

No. 104.—In 1850, A. became the purchaser of an estate for the sum of £15,000, to be completed on the 20th March, 1851, or interest at 5 per cent. to accrue till completion. The settlement was delayed until the 25th March, 1854, when the purchaser claimed a deduction for income-tax from the amount of interest, which was resisted by the vendor. Was the purchaser right, and could he retain the income-tax upon payment?

CHARLES R. GILMAN, Hon. Sec. |

Norwich, 10th May, 1854.

MOOT POINTS.

No. 82.—*Title—Will of Real Estate not Proved.*

Where real property is sold by the devisees in fee, under a will which has not been proved, will the purchaser of such property be justified in declining to complete until the will is proved? If probate is not necessary, should it not be shown that the will under which the sale is made is the last will of the testator?

The vendor's solicitor declines to prove the will, on the ground that it is not necessary to prove wills of real estate only. The will is not to be handed over, but the vendor offers a deed of covenant for its production.

J. P. S. (Holbeach.)

No. 83.—*Legacies—Satisfaction.*

A., by his will, bequeathed to E., F., G., and H. (minors), the sum of £4,000, to be equally divided among them, share and share alike, which sum he desired should be paid within six calendar months after his decease, or interest on the same from that time till paid. He appointed B. and C. executors, and, by a codicil, appointed D., the father of E., F., G., and H., an executor jointly with B. and C. The £4,000 was paid to D., as father of the legatees, for which he gave a receipt *in trust for his said four children*, and the same remained in his hands till his death, the children having attained their majority. D. maintained his children during their minority, as also since they attained their majority, and in his lifetime made gifts to them, as is usual, and by his will gave certain devises, bequests, and annuities to them, and in their favour, without, however, making any mention of the legacies so received in trust for them. After D.'s death, C., the surviving executor of A., knowing the money was so paid to D., applies to his executors to discharge the legacies out of his estate.

The question raised is whether or not the benefits given by the will may not be reckoned as a satisfaction of the legacies so received by D.? If not, from what time should interest be paid? J. B. B.

No. 84.—*Will—Construction of Devises.*

J. S., by will dated 1st March, 1834, devised and bequeathed to his wife, A. S., all the houses, gardens, and other buildings, which he then occupied at B——, the house, land, &c., then in the several

occupations of W. W. and T. P., as tenants under him from year to year; also gave and bequeathed a piece of land, situated at B—— (which he lately purchased of A. B.), which other close the said testator gave to said A. S., to be by her enjoyed during her natural life, and for her at her decease to dispose of, along with all the other property mentioned above, as she might think proper. Also gave and bequeathed all the rents arising out of a public-house at B——, then occupied by M. L.; also all the rents of nine cottages, &c., then occupied by, &c., as tenants from year to year, which other rents the said testator directed were to be enjoyed by her during her life; “but if she married, she then lost the benefit of the rents, and the said rents would then be the property of R. S.,” to whom the said testator gave and bequeathed all that public-house, with the nine tenements; also the said testator gave and bequeathed to R. S. all that house, &c., at N——.

A. S. is now dead, and R. S. has come into possession of the property given by the said will to him.

Queries.—1. What estate did A. S. take in the property thereby bequeathed to her? 2. What estate did R. S. take in the property thereby bequeathed to him? T. P. D. (Ludlow.)

No. 85.—*Rule in Shelley's Case—Marriage Settlement.*

E. W., being seised of ten acres of freehold and copyhold land at F——, in the county of H——, was married to P. B. in the year 1813, and upon her marriage entered into certain articles of agreement, dated the 10th June, 1813, whereby the said P. B. covenanted with C. D. (a trustee under the agreement) that he would, in the event of the said marriage, join with the said E. W. in conveying, surrendering, and settling the said ten acres of land at F——, “to the use of the said E. W. and her assigns for and during the term of her natural life, and from and immediately after her decease to the use of the said P. B. and his assigns for and during the term of his natural life, and from and immediately after his decease to the use of the issue of the said intended marriage, his, her, and their heirs and assigns for ever; and for default of such issue, to the use of J. W. and T. W. (brothers of the said E. W.), their heirs and assigns for ever.” T. W. died in 1823; J. W. died in 1832; E. W. (afterwards E. B.) died in 1849, and P. B. died in 1852, and remained in possession of the land until his death.

A. B., of N——, is the heir at law of the deceased P. B., and W. W. is the heir at law of the said J. W., but not of the said E. W.

Quere.—1. Does this case come within the rule in Shelley's case? and did the deceased P. B. take any larger estate than a mere

life interest? and is A. B. entitled to any and what estate as his heir at law? 2. If the said A. B. has no title to the land in question, is W. W. absolutely entitled to it in fee simple?

J. S. BROWN (Eaton, Norwich).

No. 86.—*Master and Servant—Departing without Consent.*

A. B. engaged C. D. as governess for a year, from the 25th of March, 1853, at the yearly salary of £20. She remained in the service of A. B. till the 24th of December, in the same year, when she left, and has since declined to return. £15 was then due to her for teaching A. B.'s children, for which sum she has applied to the said A. B., who refuses to pay it, alleging that C. D. never fulfilled her contract. Can C. D. sue him for the sum claimed?

J. S. BROWN (Eaton, Norwich).

No. 87.—*Devise—Dower.*

Suppose a man seised in fee to devise B—— to his wife, out of which she would be entitled to dower, and suppose him to die seised of D—— in fee, out of which she would also claim dower, but the latter is of much greater value than the former, can the widow in this case renounce her claim to B—— under the will of her husband, and claim her dower out of D——? or would such a devise be a total bar under the Dower Act, assuming that the widow was married since 1834?

J. S. BROWN (Eaton, Norwich).

No. 88.—*Devise—Infant.*

A. devised an estate at —— to B., his son, who was an infant at the death of his father. *Quære.* Can he give a legal discharge for the rents?

J. S. BROWN (Eaton, Norwich).

No. 89.—*Feme Covert.*

A promissory note being given to a married woman, and her husband afterwards dying before the note was paid, does the note become the property of the wife or the executors?

J. S. BROWN (Eaton, Norwich).

NOTE.—We have received about thirty other Moot Points, which shall be inserted in the Number for the 15th of June. It will be desirable not to send any more for *that* Number, and any of the above can, if wished, be repeated. As we shall have so many *new* Subscribers, it is desirable to make a fresh start with Moot Points and Answers.—Eds.

ANSWERS TO MOOT POINTS.

We are continually receiving communications complaining of the too great space (as it is alleged) allotted in the Magazine for Answers to Moot Points, and certainly, looking at the comparatively few who send Answers, we feel there is some ground for the complaint. As far as we are concerned, we are rather disposed to admit than to reject Answers, but we as find there are those who object to so many Answers, we must, for the future, be more strict than heretofore ; but we trust it will be understood that we have no desire to altogether prevent those of our subscribers, who may be so inclined, from answering the Moot Points. We will only request attention to the following regulations, which we think it desirable should be borne in mind.

1. Every Answer should (where possible) contain a reference to some authority, and, generally speaking, this should be a decided case, or some good text-book treating the subject in detail. We think gentlemen who answer the Moot Points should show that they have read other works than Blackstone's Commentaries, or other similar elementary works, most of which it may reasonably be supposed that the Mooters have consulted before submitting their queries.

2. A little compression would be desirable, but not to the extent of merely giving a "Yes" or "No" answer.

3. We could wish that no answer should be sent for insertion until some correspondence had taken place with the Mooters, or other parties, whose names are in the published List of Correspondents. We are satisfied that much of the complaint which reaches us, as to the number and quality of the answers, would cease, if these matters were to receive attention ; and we have no doubt whatever that such correspondence would tend much to the mutual improvement of the parties engaging in it. Ours is rather an unpleasant position in this matter, because our motives may be misunderstood, but we must ask our writing and non-writing subscribers to exercise a little mutual forbearance, and to give us credit for a desire to please both parties, as far as that is possible.

Since the above was written we have received a communication from which we present some extracts ; this we do in order that it may be seen that there are some who complain. Some portions of the communication, which might be considered personal, we have struck out.

"I regret that you devote so much space in your Magazine for the insertion of Moot Points and Answers ; they occupy nearly eighteen

pages, or about one-third of this month's Number. I am confident that many of your Subscribers think that your Magazine might contain matter far more useful and *authoritative*. I can assure you that two out of three of the artied clerks in this town, who, two or three years ago subscribed to your Magazine, ceased doing so solely on account of their objecting to the insertion of so many Moot Points and Answers, and that the third countermanded your Magazine because you allowed Mr. —, a former subscriber, to occupy so very many of its pages. I presume your wish is to make the Magazine useful as a Book of Reference; I submit, with due deference, that few of your subscribers can safely place any confidence in the Answers to the Moot Points; I have noticed many of them evidently incorrect. I must say that I expected you would have finished the Questions and Answers on the New Equity Practice in your present number [they are complete.—Eds.]. I have found them and your Questions on the Common Law Practice, and your Letters on Conveyancing and Simple Contracts most useful. I am sure that many of your subscribers feel grateful to you for inserting them, and that they will afford many of them much assistance in studying for the examination."

We are always glad of a "hint" as to anything which may not be generally pleasing, as we feel that our subscribers ought to be good judges of what is suitable to them. We see that we must adopt some more stringent rule as to the Answers to the Moot Points. As to the Moot Points, we do not think the space they occupy can be grudged, particularly as our readers ought to exercise themselves in endeavouring to answer them. But as to the Answers thereto, we think, on further consideration, we must lay down this additional rule for our guidance, namely, not to admit, in any case, more than three answers, and, where the point is of no great importance or novelty, only two. In fact, we will first insert one, and then if it can be shown that that answer is not correct we will admit a communication containing strictures on it, and afterwards, if fairly called for, one short communication, by way of reply. We are not at all desirous to stop the insertion of Answers but only to give satisfaction to as many as possible of our Subscribers.—Eds.

No. 59.—*Attorney's Lien for Costs* (*ante*, p. 229).

B.'s lien upon his client's deeds and papers is good for the general balance of his account. (See *Stevenson v. Blakelock*, 1 M. and S. 535).
X. Y. Z.

No. 51.—*Law of Evidence—Proof of Post-marks* (*ante*, p. 227).

The post-office mark upon a letter is deemed *prima facie* evidence that the letter has passed through the post-office; but in order to

prove its genuineness, a clerk of the post-office may be called, or any person who has been in the habit of receiving letters with the post-office mark stamped thereon, and who would be able to speak with certainty, of the post-mark of the particular office. See Taylor on Evidence, p. 942. SAMUEL TURNER (Mansfield).

No. 42.—*Devise over if die before becoming entitled (ante, p. 224).*

I entertain a strong opinion that the testator intended by his will, that his sister-in-law *should become entitled* to her share of the trust moneys and premises upon the death of his widow.

The widow being the survivor, I conceive that the interest of testator's sister-in-law did not become vested in her, and that consequently A. alone is entitled to the property devised and bequeathed by the will. T. H. SHACKLOCK.

No. 52.—*Trust Estate—Mortgage Deed (ante, p. 227).*

I think it would be unadvisable to allow the trust to appear on the face of the mortgage deed, for I conceive that notwithstanding any declaration that might be framed, as to the application of the purchase money under the trusts of the mortgage deed, it would of necessity involve the trusts contained in the will, and in the absence of any express authority in the testator's will to the trustee to give receipts, &c., purchasers under the powers of sale contained in the mortgage security would be liable to see that the provisions of the will were complied with, as to the application of the money.

If there be circumstances by which it is deemed advisable that the money should appear to have been advanced by the trustee out of his trust funds, I should consider that the better plan would be to have a declaration of trust by deed poll to the effect required.

LEX.

No. 41.—*Devise on attaining twenty-one (ante, p. 224).*

The word "respectively" in the decision *Heathe v. Heathe*, 2 Atk. 121, created a tenancy in common, and the present case may, I think, be considered in this respect somewhat analogous.

The deceased nephew's share became a vested interest immediately after the death of the testator, to take effect in possession on his attaining that age, and in case of his death before he attained that age his heirs would become entitled to the real estate, and his next of kin to his share of personalty.

See *Doe v. Lea*, 3 T. R. 43, and vol. ii. of *Crabb's Conveyancer's Assistant*, 2nd edit. p. 549. J. H. SHACKLOCK (Mansfield).

AN ANALYSIS OF PRESTON ON ESTATES.

[Continued from p. 278.]

Recovery of a rent in tail—Incorporeal hereditaments de novo—Statutes of Limitation—Rights of entry devisable and assignable—Quantity and quality of estates—Determinable fees—Estates considered according to their various subdivisions—Limitation of estates to heirs, &c.—Grant by a termor of his interest for life—Bequests by termor—Grant in fee by tenant for life—Grant or devise to a man and his executors—Bequest by termor to a man and his heirs male of his body—Leonard Lovie's case—Somerville v. Lethbridge.

If, on a grant of a rent for an estate in tail, a recovery was suffered by the grantee, what was its operation?

The recovery did not give an interest larger than the grantee had before; the grantee and his heirs had by the recovery an estate so long as there was issue inheritable under the entail (18).

NOTE.—Mr. Preston refers to the case of *Chaplin v. Chaplin* (3 P. Will. 229), where L. C. Talbot is reported to have said, that if a rent *de novo* be granted in tail, without any remainder over, and the tenant in tail suffers a recovery thereof, this recovery, though it will turn the estate tail into a fee, yet the same will pass but a determinable fee, which must end on the death of the tenant in tail without issue, for the grantor never agreed to charge the land any further with the rent, and it would be a wrong to the terretenant to burthen his estate with the rent for any longer time. This subject is further explained by Mr. Butler, in his Notes to Co. Litt. 298, n. 2, where he says, "There is this difference between an entail of lands and an entail of rent, that the tenant in tail of lands, with the immediate reversion in fee in the donor, may by a common recovery bar the entail and the reversion; whereas the grantee in tail of a rent *de novo*, without a subsequent limitation of it in fee, acquires, by a common recovery, only a base fee, determinable upon his decease, and failure of the issues in tail; but if there is a limitation of it in fee, after the limitation in tail, the recovery of the tenant in tail gives him the fee simple. This was resolved in the cases of *Smyth v. Farnaby*, Carter 52; Sid. 285; and 2 Keb. 29, 55, 84; *Weeks v. Peach*, Lutw. 1224; and *Chaplin v. Chaplin*, 3 P. Will. 229; and see Lutw. 1218, 1224. The reason of this difference is, that it would be unjust that the conveyance of a

grantee of a rent should give a longer duration or existence to the rent than it had in its original creation. It is true that the barring of an estate tail in land is equally contrary to the intention of the grantor. But a rent differs materially from land. The old principles of the feudal law looked upon every modification of landed property, which was considered to be against common right, with a very jealous eye. Now, a rent charge was supposed to be against common right, the grantee of the rent charge being subject to no feudal services, and being a burthen upon the tenant who was to perform them. Upon this principle the law, in every instance, avoided giving, by implication, a continuation to the rent, beyond the period expressly fixed for its continuance. Thus, if a tenant in tail of land die without issue, his wife is entitled to dower for her life out of the land, notwithstanding the failure of the issue; but the widow of a tenant in tail of rent is not entitled to her dower against the donor. So, if a rent is granted to a man and his heirs generally, and he dies without an heir, the rent does not escheat, but sinks into the land. It is upon this principle that when there is not a limitation over in fee, a tenant in tail of rent acquires, by his recovery, no more than a base fee. But if there is a limitation in fee, after the particular limitation in tail, the grantor has substantially limited the rent in fee; and, therefore, it is doing him no injustice that the recovery should give the donee, who suffers it, an estate in fee simple."

Suppose the grant, in the preceding case, had limited remainders after the estate tail, what would have been the effect of the recovery?

In this case the estate tail would have been rendered co-extensive with the remainders limited by the grant (18).

NOTE.—See the note to the preceding answer.

To what period is the origin of the estates or times for which incorporeal interests are held to be referred? and what is the effect of the extinguishment of the interest or subject?

The origin of the estates for which incorporeal interests are held is to be referred to the period at which they were created; that is, the period of their first commencement. When the interest or subject is extinguished, the estate for which it is held is also extinct as a necessary consequence; for nothing remains in which an estate may subsist (19).

NOTE.—The point referred to is this: in the case of lands we have an always subsisting subject-matter, whereas in the case of incorporeal interests, at least in the generality of them, they cease with the estate limited therein. Thus, if a rent be granted in tail, if there be no issue, both the estate and the subject-matter cease: it is not a rent in the hands of the grantor; whereas if an estate tail in

lands be determined by the death without issue of the donee (the same not having been barred), the subject-matter has continuance, and there is also an estate in existence, though not the estate tail; *i.e.*, either one granted or reserved in terms, or arising by implication. In fact, in lands there is an always subsisting estate in fee simple.

How are incorporeal hereditaments to be considered with reference to the grant thereof?

As, 1, interests created *de novo*; 2, interests already created (19, 218, 247).

NOTE.—These differences are important as to the limitation of a *future* freehold, or the suspension of it for a time (218, 247).

When is an interest said to be created *de novo*?

When it is granted, and the time of the continuance thereof is marked by the *same* instrument (19).

When is an interest said to be existing?

When having been created and the time of its continuance limited at the same time, it is at a subsequent period granted or transferred, either for the whole or part of the time (20).

When the right of enjoyment of an estate is interrupted, what is the effect?

The estate is turned to a right, and cannot be recovered without an entry or action; in the meantime, the party out of possession has not the estate *in* the property, but has merely the *right to an estate* (20).

NOTE.—Formerly an action (*i.e.*, a *real* action) might in most cases have been brought after the party's right of entry was gone; but now there can be no action unless there is a right of entry. All real actions, except for dower, are abolished, and besides these and *quare impedit*, the only action for recovering the possession of real estates is an ejectment. It is to be observed, as noticed by the Real Property Commissioners, in their First Report, that after an adverse possession of sixty years, by which the highest remedy (*viz.*, by writ of right) was barred, under *some circumstances* a right of entry might still have been put in force. And in some special cases (Burton's Comp. pl. 375, 388, 389), when the right of entry was lost, there was no remedy by action. But these were exceptions to the ordinary rule, that though the right of entry were gone, there still remained a right of action.

Are rights of entry devisable and assignable?

The better opinion was that rights of entry were not devisable, and they were not, except from a bankrupt or insolvent to his assignees, assignable (21).

NOTE.—By the 1 Vict. c. 26, s. 3, rights of entry for conditions broken, and other rights of entry, are devisable. By the 8 & 9

Vict. c. 106, s. 6, rights of entry, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England of any tenure, may now be disposed of by deed (Littleton, pp. 75, 144). The case of *Hunt v. Remnant*, there mentioned, has since been reported in 18 Jurist, p. 335. The Court of Exchequer Chamber were very careful not to give any opinion on the point whether a right of entry for condition broken on a lease is capable of assignment under the above statute.

What is meant by the quantity of the estate?

The time for which the right of enjoyment is to continue (21).

What is meant by the quality of the estate?

The manner in which the right to the enjoyment is to be exercised, as absolutely, solely, in common, in coparcenary, or in jointtenancy (21, 22).

What observation is applicable to determinable and qualified fees?

That there is so near a relation between the quantity and quality of the estate, that the quality of the estate is the measure of its quantity. The same observation applies to estates which have a collateral determination, as to A. for 99 years, if he should so long live (22).

What is observed by the limitation mentioned at the end of the preceding answer?

That the determinable quality of the estate is marked by the clause "if he should so long live," and this phrase also forms part of the quantity or measure of the estate (22).

What is observed of a grant to a man and his heirs so long as a tree shall stand?

That the words which relate to the tree form an essential part of the measure of the estate, and at the same time render the estate a determinable fee (being its quality), instead of being an absolute fee (22, 28).

How are estates classed as to their general qualities?

Into, 1, those of freehold; 2, those not of freehold (22, 200).

How are estates arranged as to their extent?

Into, 1, general; 2, qualified; 3, particular (23).

How are estates arranged as to the circumstances under which they are to confer a present right (either of present or future enjoyment), or a future right of future enjoyment?

Into, 1, executed; 2, executory (23).

How are estates arranged as to the *certainty* of their giving a present or future right of enjoyment?

Into, 1, vested; 2, contingent (23).

How are estates arranged as to the time at which they are to confer the right of enjoyment?

Into estates, 1, in possession ; 2, in remainder ; 3, in reversion (23).

How are the estates mentioned in the preceding answer, in regard to the relative situation they bear to each other, said to be ?

1, Preceding and expectant, or depending ; 2, mediate and immediate ; 3, original or primitive, and not original or derivative (23, 121—123).

How are estates arranged with respect to the manner in which the right to the enjoyment is to be exercised ?

I. Into (as regards the certainty of continuance) interests (1) absolute ; (2) determinable ; (3) conditional. II. Into (as regards the mode of tenancy) enjoyment by (1) one person separately, *viz.*, in sole tenancy ; (2) several persons together and at the same time (24).

How are estates said to be held with respect to the connexion of the owners, where there are several ?

1, By entireties ; 2, in joint-tenancy ; 3, in coparcenary ; 4, in common (24, 130—139).

How are estates arranged as to the mode in which they are created, limited, or transferred ?

Into estates, 1, by limitation of the legal estate ; 2, by limitation of use ; 3, by resulting use ; 4, by limitation of trust ; 5, by implication of law (24, 142, 182, 185, 190, 290, 309).

In what different ways are estates denominated ?

1. From the quantity of interest, in point of time, which they comprise, as in fee simple—*i.e.*, to heirs general ; in fee tail—*i.e.*, to all or some of the heirs of the body ; or for life, for years, or at will. 2. From the modes by which they are raised, as by the common law, the Statute of Uses, &c. 3. From the manner in which they are taken, as by limitation, springing use, &c. 4. The terms upon or mode in which they are held, as on condition, in joint-tenancy, &c. (25.)

How is the time of limitation or continuance of estates marked ?

1. By naming the description of persons by whom the estate is to be enjoyed, as heirs general, or heirs of the body only. 2. By fixing on a certain definite period, as a term of years. 3. By referring to some event which, though uncertain as to the time when it will happen, must happen or become impossible, in some cases, within the period of a life, as on the return of C. from Rome ; in others, within an indefinite period, as till failure of heirs of the body, or during peerage, &c. ; and sometimes the time of enjoyment is marked by more than one of these means, as for years if A. should so long live (26).

In limiting a fee simple by a deed, what words are generally used ?

The word "heirs," to which are usually added the words "for ever," which, though not necessary, are proper, particularly with a view to the covenants for title, in reference to the estate which is limited (26, 27).

NOTE.—It is difficult to conceive that the words "for ever" can have any effect on the limitation of a fee simple. It is much more usual to add the words "and his assigns," and some attempt has been made to sustain their propriety with reference to covenants; but there does not seem to be any ground for asserting that they give any additional efficacy to the proper words of limitation. Among our *lengthy* conveyancers the words used are "heirs and assigns for ever." One of these, Mr. Barton (1 Preced. p. 138, note), whilst admitting that a limitation to a purchaser "and his heirs" is alone fully sufficient to give him the whole fee, says "the words 'and assigns for ever' are, therefore, used only by way of *emphasis*." And he then proceeds to tell us—what we need not be greatly surprised at when we consider the consequences of allowing a deviation from what is strictly correct and proper—"The word '*devisees*' has by some *modern* practitioners been introduced with the words 'heirs and assigns;' and although there may appear to be something of propriety in this, particularly in the covenants for the title, as the *devisee* does not strictly come within the ordinary import of the word *assigns*, and, therefore, may seem not to be comprehended within the words of a covenant in which the 'heirs and assigns' only of the covenantee are named; yet as a devise of land is as much in the nature of a *deed* as of a testamentary disposition (2 Blac. Com. 378), and the word *assigns*, therefore, not inapplicable to the character of a devisee, it seems unnecessary to depart from the hitherto accustomed language. See *How v. Whitfield*, 1 Ventris, 338, and *Roe dem. Bamford v. Hayley*, 12 East, 464, where it was determined that a covenant with a man, his heirs, and assigns, imports a covenant with his representatives in general, and, therefore, extends to his devisee: and see *Kingdon v. Nottle*, 4 Maule and Selw. 53." We perceive Mr. Williams (Princ. Real Prop. 121, 3rd edit.) says, "so that though conveyances of estates in fee simple are usually made to hold to the purchaser, '*his heirs and assigns for ever*,' yet the words '*heirs*' alone gives him a fee simple, of which the law enables him to dispose; and the remaining words, '*and assigns for ever*,' have at the present day no conveyancing virtue at all, but are merely declaratory of that power of alienation, which the purchaser would possess *without them*."

If a termor grant to another and his heirs, or the heirs of his body, what passes?

The whole of the term; but the executors of the grantee, and not his heirs, will be entitled on his death (27).

Mr. Preston refers to Sheppard's Touchstone, p. 426, but there is nothing there on the point; the reference should be to pp. 469, 470, where Sheppard says: "If a lease for years of land be granted to me and my heirs, or to me and my successors, and I die, my executor or administrator, and not my heir, shall have this term," &c. &c. "And if a man be possessed of a term of years of land, and grant it by deed, or give it by will, to me and my heirs, or to me and my heirs male, or devise it by will to A. for life, the remainder to me and my heirs, in these cases I shall have these terms of years as chattels, and after my death my executor or administrator shall have them." Mr. Preston's statement is, of course, quite correct, and we have only added Sheppard's statements in order to prepare the student for the answer to the following question:—

If a termor grant to another for life, what passes?

The whole term; but the estate of the grantee will be determinable by the death of the person whose life is named (27).

NOTE.—It is not very clear of what life Mr. Preston is speaking; among his references is one to 7 Coke's Rep. 23 a., where it is said, if lessee for years of a carve of land grant the carve of land to another for the term of his life, the lessee hath the whole term if he live so long. Another reference is to his own work on Abstracts (vol. ii. p. 2), where it is said, "if lessee for years grant land to another for the term of *his life*, the grantee hath the whole term; but with this collateral determination, if the grantee live so long." Sheppard (Touchstone, p. 268) says, "If lessee for years make a lease for life, it seems by this the land will pass for life, if the term of years last so long. But if he give livery of seisin upon it (as he must [*formerly*] have done to make the lease for life good), this is [*or rather was*] a forfeiture of the estate for years." Laying aside the point of forfeiture (and even formerly there was no forfeiture in the case of a remainder-man or reversioner, or even of an estate in possession in an incorporeal interest, Com. Dig. tit. "Forfeiture," A. 1, 3), the question remains, what is it that Mr. Preston means by saying that the estate of the grantee will be determined by "the death of the *person whose life is named*?" This seems to refer to a grant for the life of a third person, as thus: Termor grants his term to A. to hold during the life of B.; B. dies: who has the term? This is a point which will afford some of our ingenious subscribers an opportunity of displaying their learning, and we shall be glad to hear from them ~~whereon~~, and it will be as well to discuss the matter with reference to the old law and to the new law, *i.e.*, since the 8 & 9 Vict. c. 106. And was livery really necessary? It is a matter, perhaps, which some may think more curious than practical, but we conceive that the student will learn something useful in the course of the investigation.

When a limitation is made by a deed to a man generally, *i.e.*, without any mention of the time for which he is to have the land, or other limitation of the estate, what estate passes?

An estate at will or for life, according to the ceremonies observed in perfecting the assurance, unless the grantor be a mere termor, or in the case of the sovereign's grant (28, 29).

NOTE.—Mr. Preston here alludes to the distinction which subsisted prior to the 8 & 9 Vict. c. 106, between the transfer of things lying in livery and of things lying in grant. A conveyance of things lying in livery required, in order that a freehold should pass thereby, that livery should be given, whilst a freehold of things lying in grant passed by the sealing and delivery of the deed. But now livery is not requisite, except on a feoffment, and possibly such a deed, if containing the word "grant," as it usually does, would be effectual without livery (*ante*, pp. 123, 273, 274).

What is the effect of a grant or bequest by a termor to another in general terms?

To pass the whole interest of the grantor or devisor (28).

Where a person has an estate for years or for life, and bequeaths a rent generally, what is the effect?

The rent will continue during the existence of the estate (28, 29).

Mr. Preston cites his own work, *viz.*, 1 Abstracts, 442, but there is nothing there on the point; at least not in the 2nd edition. He also cited Rolle's Abr. tit. "Estate," H. 5, which is in point, being as follows: "If a man possessed of a lease for years of land grant a rent out of the land to another generally, without limiting any estate, this shall be during *all the term, and not determinable by the death of the grantee.*"

A termor devises an annuity out of his term, what is the effect?

The annuity will continue during the term (29).

Where a person having a life estate conveys same to another in fee, what estate passes?

Only the life estate, though formerly where the limitation was by a feoffment, fine, &c., by the forcible operation thereof a *tortious fee* passed (29).

NOTE.—Fines are now abolished (3 & 4 Will. 4, c. 27), and a feoffment has no longer any tortious operation (8 & 9 Vict. c. 106).

In a deed, will a limitation extending the grant to the grantee's executors have any effect?

None, whatever; the estate will be of the same quantity as it would have been in case no mention had been made of the executors (30).

Had the mention of executors in a will any, and what effect formerly?

It was considered to express an intention that the fee should pass,

but, of course, the heirs took the estate, and not the executors (30).

NOTE.—Now a general devise, without mentioning the executors or heirs, will pass a fee, unless a contrary intention appears by the will (1 Vict. c. 26).

Limitation to A. and his heirs for the life of B.; what estate passes?

An estate for the life of B., ordinarily called an estate *pur autre vie* (31, 479, 480).

On a limitation to A. and his heirs for years, what estate passes?

An estate for years, but on the death of A., his executors, and not his heirs, will have the term (31).

What operation has a bequest by a termor of the lands comprised in his term to A. and the heirs male of his body?

The term will vest in A. and be transmissible to his executors, without any right of succession in his heirs, males, or reversionary interest in the executors of the testator on failure of the heirs male of A. Such a bequest is a complete disposition of the testator's interest, unless words of qualification be annexed to the bequest, restraining the gift in favour of some other person, and introducing a limitation over on an event within the rules of perpetuity (32).

NOTE.—The above case is one of a bequest of an *existing term*; the case in the next question is one of a *newly created term*: the difference should be borne in mind.

What was the decision in Leonard Lovie's case (10 Coke's Rep. 46) and what is to be observed thereon?

It was a devise to A. and his heirs male for 500 years, and it was the opinion of the court that the term was determinable on *failure of issue male of A.* This opinion went either on the ground that the devise was to the heirs male, or that a remainder was limited to take effect on a failure of such issue male; most probably on the latter ground, which is consistent with the decision in Butt's case, 7 Coke's Rep. 23.

On a devise to a man and his heirs male for years, what estate passes?

Some say an estate tail, and adduce Leonard Lovie's case (*supra*) as a decision in point, but Lord Coke's report is not so, though the report in Moore is; and in 2 Brownlow, p. 104, Dodderidge said it had twice been decided to be a good estate tail. It is difficult to support the opinion that an estate tail passes by such a devise since *Somerville v. Lethbridge* (6 Term Rep. 213), where the devise was to A. for 99 years, if he should so long live, and after that term to his first and other sons, and the heirs male of their bodies, for the like term, and according to the priority of their births; and in default of such issue, then with similar limitations over. The Court of Q. B.

certified to the L. C. an opinion which negated the idea of an entail being created by this devise. They held all the devisees, except those to A. and his first son (who was unborn at the testator's death) to be void as too remote, and that the limitations to A. and his first son gave them *chattel* interests. If a devise to a man and his heirs male *for years* might create an estate tail, the general intention would, in this instance, have been called in to support that construction (32—35).

What estate passes on a gift to a man and his wife, and the heirs of their bodies, for years?

An estate for years only, even though livery was given. This is the opinion of Sheppard, p. 369 of Touchstone (33).

NOTE.—We have not been able to find Mr. Preston's authority in Sheppard; indeed, it is seldom that his references are correct.

EASTER TERM (1854) EXAMINATION QUESTIONS.

PRELIMINARY.

1. Where and with whom did you serve your clerkship? 2. State the particular branch or branches of the law to which you have principally applied yourself during your clerkship. 3. Mention some of the principal law books which you have read and studied. 4. Have you attended any and what law lectures?

COMMON LAW.

1. What should appear by an affidavit in support of an application to proceed against a defendant within the jurisdiction, as if personal service had been effected? 2. In what cases may a special indorsement be made on a writ of summons of the particulars of the plaintiff's claim? and what is the consequence of an omission to make such indorsement, should the defendant not appear, having been served with the writ? 3. What are the modes of proceeding in a town cause by which a defendant can compel the plaintiff to proceed to trial after issue joined? and how soon after issue joined can such proceedings be taken? 4. If a tender be made and refused before action, what steps should be taken to prevent the party availing himself of it by plea in any action to be afterwards commenced? 5. Is there any and what restriction to a husband's liability for the debts of his wife contracted before marriage? 6. In an action against executors for a debt due by their testator, which of the executors should be joined as defendants? 7. Name the contracts

required to be in writing by the 4th section of the Statute of Frauds. 8. What circumstances will render a contract for the sale of goods for the price of £20 or upwards valid, if no memorandum in writing of the bargain be made and signed by the parties? 9. The payee of an inland bill of exchange dishonoured is desirous of enforcing payment against the drawer, what inquiries should be made by his attorney to ascertain that his cause of action is complete? 10. What is put in issue by the plea of never indebted to an indebitatus count for goods sold and delivered? 11. Within what time ought notice of the dishonour of an inland bill accepted for value to be given to the drawer and indorser by the holder? 12. What liability does a factor incur by the receipt of a *del credere* commission? 13. What things are by law privileged from distress for rent? 14. Who should be named as a plaintiff in writ of ejectment? and to whom by name should the writ be directed? 15. What is the mode by which a defendant in ejectment may, if he think proper, limit his defence to part of the premises sought to be recovered?

CONVEYANCING.

1. Taking an estate tail as one kind or class, what are the different kinds or classes of estates which may be limited or created in lands and hereditaments? 2. What are the words of limitation proper to be used in a deed in creating each respective class? 3. If land be devised by will or limited by deed to A. for life, with remainder to his right heirs, what estate does A. take? 4. How is an estate tail now to be barred by a tenant in tail in possession? 5. Under what circumstances can a tenant for life in possession cut timber for his own benefit? 6. What is the mode by which the dower of a wife married since 1st January, 1834, may be barred by her husband? 7. Is a purely voluntary settlement good against a purchaser or a mortgagee for valuable consideration who has notice of it? 8. What is the difference between the covenants for a title usually and properly inserted, and to be entered into by a mortgagor in a mortgage deed, and by a vendor in a conveyance to a purchaser of real estate? 9. In making a mortgage of a leasehold estate, how would you protect the mortgagee from liability to pay the rent and to perform the covenants in the original lease? 10. A. makes a mortgage in fee to B.; B. dies intestate; who is competent to release the mortgage debt and reconvey the estate to the mortgagor? and if the mortgage had been for a term of years, answer the same question under the same circumstances. 11. State the formalities requisite for the due execution of a will since the Act 7 Wm. 4 & 1 Vict. c. 26. 12. Previous to that Act, how many witnesses were required to a will devising real estate? 13. When land is devised to A., without words of farther limitation, what estate passes?

14. To whom will a lapsed devise of real estate in a will made since 1st January, 1838, pass? 15. A., seised and possessed of real and personal estate, dies intestate, leaving a widow, an eldest son, two daughters, and two grandchildren (the issue of a younger son): on whom do his real and personal estate devolve, and in what shares and proportion?

EQUITY.

1. Has any recent alteration been made as to parties to a suit in equity? If so, state your authority, and give one or two examples. 2. What are the modes of commencing proceedings in the Court of Chancery at the present time? 3. How is a defendant brought before the court? 4. If a defendant file an answer to the plaintiff's bill, without being required to do so, what time has the plaintiff to amend his bill "as of course?" 5. When is the proper time, in a suit commenced by bill, for a motion for a decree? What notice of it must be given? to whom is it to be given? and what parties does it bind? 6. How is evidence given and taken in the Court of Chancery? and by what mode of taking evidence do you consider the truth is arrived at the nearest? 7. What is a commission to examine witnesses, or to take pleas, answers, disclaimers, or examinations? and in what cases is it necessary? 8. What is an injunction? When is it to be applied for? how is the application to be supported? how is it put in force, and how dissolved? 9. What proceedings in the Court of Chancery operate as *lis pendens*? and how do you avail yourself of them? 10. A testator, by his will, charges his real estate with payment of an annuity and the legacies given by his will. The personal estate is absorbed, and the real estate is insufficient to keep down the payments of the annuity. What is the effect upon the annuity and legacies under these circumstances? 11. Is an executor justified in paying a debt of his testator which is barred by the Statute of Limitations? 12. If it become necessary in a suit by a husband, on behalf of his children, to which his wife is not a party, for the wife by her next friend to intervene by way of petition, and the husband oppose the prayer, and appeal from the order made in accordance with the petition, and the appeal be dismissed, how are the wife's costs to be provided for? 13. What security can a husband and wife give upon a property to which the wife is entitled on the happening of a future event? 14. If a marriage settlement be lost or destroyed, how is it possible to carry out the trusts? 15. What protection is afforded by a court of equity to infants?

BANKRUPTCY.

1. What is the difference of jurisdiction in bankruptcy and insolvency, as respects the persons subject to such jurisdiction, and the

liability of their future effects? 2. What are the three conditions required to constitute a bankrupt? 3. State the principle which determines whether a person is a trader within the meaning of the Bankrupt Laws, in respect of the extent of the trading. 4. Enumerate the different acts of bankruptcy. 5. What new acts of bankruptcy were created by the statute 5 & 6 Vict. c. 122? 6. If a debtor, liable to the Bankrupt Laws, has not committed an act of bankruptcy, how can he be proceeded against in order to make him a bankrupt? 7. What is the effect of a declaration of insolvency? and within what period must a petition founded thereon be filed? 8. Can an act of bankruptcy be committed by a party after he has left off trading? and if so, is the period at which the petitioning creditor's debt accrued, in any and what particular material? 9. In an adjudication against partners, must an act of bankruptcy be proved against each partner, or will the act of bankruptcy of one of such partners be sufficient? 10. Is a conveyance or assignment of all a trader's property deemed an act of bankruptcy? or are there any and what exceptions or conditions? 11. After what lapse of time, from an act of bankruptcy committed, does a trader cease to be liable to be made a bankrupt on that act of bankruptcy? 12. Are there any and what means by which a trader can effect an arrangement with his creditors, and be discharged from his debts without a petition for an adjudication in bankruptcy, or proceeding under the Insolvent Debtors' Act? 13. What particulars are necessary to be stated in an affidavit or deposition to prove a debt under an adjudication? 14. Can joint creditors prove on the separate estate, or separate creditors on the joint estate? If so, how can they interfere in the proceedings of the bankruptcy? 15. If a bankrupt be possessed of leasehold property at the time of his bankruptcy, which is not considered by his assignees to be of any value, what course should they adopt in reference to the leases?

CRIMINAL LAW.

1. What is an indictment? 2. Into what three classes are indictable offences generally divided? 3. Describe, shortly, the nature of the proceedings by which a person charged with an indictable offence may be brought before a justice of the peace, and committed for trial. 4. What recent Act of Parliament regulates the proceedings of justices with reference to persons charged with indictable offences? 5. What are the courts at which indictable offences are usually tried in each county? and how often are they respectively held? 6. Mention some of the offences which courts of quarter sessions have no power to try, and the statute which defines those offences. 7. What is the difference between a principal in the second degree, and an accessory before the fact? 8. Are

there any indictable offences in which there can be no accessories? If so, what are they? Give the reasons for your answer. 9. What is the difference between murder, manslaughter, justifiable homicide, and excusable homicide? Give instances exemplifying your answer. 10. How far is it necessary in an indictment for murder or manslaughter to describe the means by which the offence was committed? and what recent statute has lately been passed to simplify the forms of such indictments? 11. Define the offence of larceny at common law. 12. If a servant in the course of his employment receive money from a third person on account of his master, and fraudulently appropriate it to his own use, of what offence is he guilty? 13. Describe the offence of perjury, and say how it is punishable by the common law, and by statute. 14. Define the offence of forgery, and uttering forged instruments. 15. What is the ordinary evidence required to prove guilty knowledge in uttering a forged instrument?

EASTER TERM (1854) EXAMINATION ANSWERS.

COMMON LAW.

I. *Affidavit of attempt to serve writ.*—On applying for a rule or order for leave to proceed against a defendant within the jurisdiction, as if personal service had been effected, the affidavit should show what efforts have been made to effect personal service of the writ, and it should be thereby shown either that the writ has come to the knowledge of the defendant, or that he wilfully evades service of the same, and has not appeared thereto (15 & 16 Vict. c. 76, s. 17).

II. *Special indorsement of claim on writ.*—A special indorsement may be made on a writ of summons of the particulars of the plaintiff's claim in all cases where the defendant resides within the jurisdiction of the court, and the claim is for a debt or liquidated demand in money, with or without interest, arising upon a contract express or implied, as on a bill, note, cheque, or other simple contract debt, or on a bond or contract under seal for a liquidated sum, or on a statute where the amount is a fixed sum of money, or on a guarantee, where the claim against the principal is in respect of such debt, liquidated demand, bill, cheque, or note (15 & 16 Vict. c. 76, s. 25). The plaintiff, if he omit such indorsement, will not, on the defendant's failing to appear, be entitled to sign final judgment at once, but must file a declaration, with a notice giving the defendant eight days' time

to plead thereto, and the plaintiff will not be entitled to more costs than if he had made a special indorsement, and signed judgment on a non-appearance—*i.e.*, he will not be allowed for the declaration and notice to plead (*Id.* s. 28).

III. *Proceeding to trial.*—The defendant may, both in a town and in a country cause, compel the plaintiff to proceed to trial (or on his default get the cause disposed of, which is what the examiners mean), by taking the cause down for trial by proviso, or, which is the ordinary course, by giving the plaintiff a twenty days' notice to bring the issue on to be tried; in which case, if the plaintiff does not give a due notice of trial for the next sittings in town, or the assizes in the country, and bring the issue on to be then tried, the defendant may enter a suggestion thereof on the record, and sign judgment for his costs. In town causes, where issue is joined in, or in the vacation before any term, for instance, Hilary Term, and the plaintiff neglects to bring the issue on to be tried during or before the following term and vacation, for instance, Easter Term and vacation, the defendant may give such notice as aforesaid (15 & 16 Vict. c. 76, s. 101; 5 Mag. N.S. 363).

IV. *Tender.*—Where a tender is made and refused before action, if the plaintiff wish to prevent the defendant from availing himself of such plea, he should, before commencing his action, demand of the defendant payment of the sum tendered (Selw. N. P. 162, 11th edit.)

V. *Husband's liability for wife's debts.*—There is no other restriction to a husband's liability for the debts of his wife, contracted before marriage, than this, that if the debts be not recovered against him and his wife (for in respect of such debts they must *both* be sued) in the lifetime of the wife, he cannot be charged therewith either at law or in equity after her decease (*Heard v. Stamford*, 3 P. Will. 409; 7 Term Rep. 348).

VI. *Action against executors.*—For a debt due by a testator, it is enough to sue the executor who has proved the will; for the mere circumstance of a person being named executor does not compel the plaintiff to make him a defendant, unless he has administered. Of course, where there are two or more *administrators*, they must all be sued, for the taking out administration is the act of each of them (Selw. N. P. 809, 11th edit.)

VII. *Statute of Frauds.*—Sect. 4 of the Statute of Frauds, requiring contracts or agreements to be in writing, applies to promises by executors, guarantors, contracts made upon the consideration of marriage, or relating to the sale of an interest in lands, and agreements not to be performed within one year from the making thereof (5 Mag. N.S. § *et seq.*; Princ. Com. Law, 391).

VIII. *Statute of Frauds—Unwritten contract for sale of goods.*—Though the Statute of Frauds requires, in general, that a contract for the sale of goods of the value of ten pounds or upwards (and not £20, as stated in the question) should be in writing, yet such writing is not absolutely necessary where the buyer accepts part of the goods sold, and actually receives the same (5 Mag. N.S. 564, *et seq.*; *Holmes v. Hoskins*, Dig. of Cases in this Number), or gives something in earnest to bind the bargain, or by way of part payment (5 Mag. N.S. 560—570).

IX. *Bill of exchange—Payee v. Drawer.*—The solicitor should inquire whether due notice of the dishonour of the bill was given to the drawer.

X. *Goods sold—Never indebted.*—A plea of "Never indebted" to an indebitatus count for goods sold and delivered, puts in issue the sale and delivery of the goods (Plead. Rule Hil. Term, 1853, pl. 6).

XI. *Notice of dishonour of bill.*—A notice of the dishonour of a bill of exchange should be given by the holder to the drawer and indorser thereof within a reasonable time, *i.e.*, where the parties live in the same town, in the course of the day following the dishonour; if they live at different places, the notice should be sent by the next post, if there be a reasonable time (*Tindal v. Brown*, 1 Term Rep. 167; *Princ. Com. Law*, 377).

XII. *Factor—Del credere commission.*—A factor having a *del credere* commission, becomes liable to his principal for the goods sold, in case the purchaser fails to pay. The phrase is an Italian mercantile term, having the same signification as the English word guarantee (6 Brown's Parl. Cases, 287, Toml. edit.; *Grove v. Dubois*, 1 Term Rep. 112). In fact, the commission imports that if the purchaser of the commodity does not pay, the factor will, and so it is a guarantee from the factor to the principal against any mischief to arise from the purchaser's insolvency (*Selw. N. P.* 819, note, 11th edit.)

XIII. *Distress.*—Some things are privileged from distress, either absolutely or conditionally only. Thus, of the latter kind are tools and utensils of a man's trade, and beasts of the plough, or sheep, which are distrainable only where there are no other goods on the premises. With respect to the first sort—*viz.*, those absolutely privileged—the following are some of them:—Landlords' and tenants' fixtures annexed to the freehold; things in actual use; things in which there is no valuable property; things in the custody of the law, &c. (see *Key*, div. "Common Law," pp. 5—8, 3rd edit.)

XIV. *Writ of ejectment.*—The parties to be named as plaintiffs in a writ of ejectment are the persons who allege they have a title;

and the defendants to whom the writ is to be directed, are the persons in possession of the premises sought to be recovered (15 & 16 Vict. c. 76, ss. 168, 169).

XV. *Defendant in ejectment limiting his defence.*—A defendant may limit his defence to a part of the premises sought to be recovered, by giving a notice to that effect to the attorney for the claimants. The notice should describe the part of the premises intended to be defended for with reasonable certainty (15 & 16 Vict. c. 76, s. 174).

CONVEYANCING.

I. *Classes of estates.*—So far as we understand this, the different classes or kinds of estates which may be limited or created in lands and hereditaments are, besides estates tail, fees simple, conditional fees, base, determinable, or qualified fees, and estates for life and for years (Key, div. "Conveyancing," p. 24, 3rd edit.)

II. *Limitations of estates.*—The proper words to create a fee simple, in a deed, are "his heirs;" a fee tail, "heirs of his body;" conditional fee, the same words, where the subject matter is a personal annuity, or a copyhold not entailable; a base, determinable, or qualified fee to A. and his heirs, "tenants of the manor of Dale," or "so long as a certain tree shall stand," &c. See a variety of instances enumerated, 1 Prest. Estates, 431—433. In the creation of estates for life, the estate may be simply granted to the party without any limitation, or may be expressly for his life; the latter is the more usual, and is better for the grantee. An estate for years is usually limited to the lessee, his executors, administrators, and assigns.

III. *Limitation for life, remainder to heirs.*—On a limitation of land by will or by deed to A. for life, with remainder to his right heirs, A. takes an estate in fee under the rule in Shelley's case, mentioned *antè*, p. 153.

IV. *Barring estate tail.*—An estate tail is now barrable by a tenant in tail in possession, by any deed of disposition duly enrolled within six months (see vol. v. N.S. pp. 456, 457). The tenant in tail being described as one in possession, it is presumed that there is not any one who is a protector of the settlement within the meaning of the 3 & 4 Will. 4, c. 74.

V. *Tenant for life—Cutting timber.*—A tenant for life in possession may cut timber for his own benefit for necessary fuel or repairs; and if declared dispunishable waste, may cut down timber generally, so that he does not do so in an evidently destructive or malicious manner, and does not cut down timber planted for ornament and protection of the estate (Co. Litt. 41 b.; 1 Atk. Convey.

36, 37; Key, div. "Equity," pp. 24, 25, 2nd edit.; Key, div. "Conveyancing," p. 45, 3rd edit.)

VI. *Barring dower*.—The dower of a woman married since 1st January, 1834, may be barred in various ways; as by a declaration in the purchase deed, that the wife shall not be entitled to dower out of the lands conveyed (which is the ordinary mode); by such a declaration in any deed executed by the husband; by a similar declaration in his will; by a devise to the wife of any land out of which she would have been entitled to dower (3 & 4 Will. 4, c. 105, ss. 4, 6, 7, 9; Littleton's Ten. p. 13, note to s. 36).

VII. *Voluntary settlement*.—A voluntary settlement is not good against a mortgagee or purchaser for valuable consideration, though having notice of the voluntary settlement (Princ. Equity, 87; Key, div. "Conveyancing," p. 106, 3rd edit.)

VIII. *Covenants in purchase deeds and in mortgages*.—A vendor enters into qualified covenants for title, whilst a mortgagor is usually required to enter into absolute covenants (2 Mag. N.S. Suppl. 183; Key, div. "Conveyancing," p. 78, 3rd edit.)

IX. *Mortgage—Leaseholds*.—In preparing mortgages of leaseholds, since the decisions establishing the liability of the assignee to the rent and lessee's covenants which run with the land, even though he do not take possession (*Williams v. Bosanquet*, 3 Moore, 500; 5 Jarman's Convey. by Sweet, 430), it has become usual to make them by way of *under-lease*, instead of assignment, a reversion of a single day or a few days being left in the mortgagor (5 Jarman's Convey. by Sweet, 508. See further *Westerdell v. Dale*, 7 Term Rep. 312; Selw. N. P. 513, n. 11th edit.; 2 Walford's Part. to Actions, 1159; Platt on Coven. 486, 488; *Burton v. Barclay*, 7 Bing. 745; 2 Law Stud. Mag. N.S. p. 12). What is above said relates to a *legal* mortgage, it being well settled that an *equitable* mortgagee, by way of deposit of a lease, is not liable to the covenants in the lease (*Moore v. Choat*, 8 Sim. 408; *Moore v. Greg*, 12 Jur. 911, 952; 1 Law. Mag. N.S. 23, disposing of *Lucas v. Comerford*, 3 Bro. C. C. 166, and *Flight v. Bentley*, 7 Sim. 149). Though, as above stated, mortgages of leaseholds are usually taken by way of *under-lease*, in order to avoid any liability to the landlord, yet where the property is valuable as a security, an assignee does not often incur much danger, and he may at any time get rid of his liability by assigning to a pauper.

X. *Death of mortgagee—Reconveyance*.—Where a mortgagee in fee dies intestate, the administrator is the party to receive the money and give a discharge for it, but the estate must be reconveyed by his heir at law. Where the mortgage is by *demise*, the administrator alone can receive the money, give a discharge for it, and reconvey the term (see Key, div. "Conveyancing," pp. 87, 88, 3rd edit.)

XI. *Execution of a will*.—A will must be signed at the foot or end thereof (but the intervention of an unwritten blank, &c., will not now be fatal, 15 & 16 Vict. c. 24, s. 1) by the testator, or by some other person in his presence, and by his direction; and be made by the testator, in the presence of two or more witnesses, *present at the same time*; and such witnesses must attest and subscribe (and not formally acknowledge a previous signature, 13 Jur. 712) the will in the presence of the testator (and it is prudent that they should do so in each other's presence); but no form of attestation is necessary, though it is usual for probate purposes to have one, stating that all the requisites of the statute have been complied with (1 Steph. Com. 553, 554, 1st edit.; p. 569, 2nd edit.; 27 Law Mag. 306—309; see 6 Mag. 297; 2 Mag. N.S. Sup. 104, 136).

XII. *Old wills*.—Previously to the 1 Vict. c. 26, to a will devising real estate three witnesses were requisite; to a will of personal estate no witnesses were requisite (Burton's Comp. pl. 935).

XIII. *Devise without words of limitation*.—On a devise to A. without any words of limitation, a fee simple, if the testator had such an estate, will pass, unless the context shows a contrary intention (1 Vict. c. 26, s. 28; Key, div. "Conveyancing," p. 137, 3rd edit.)

XIV. *Lapsed devise*.—A lapsed devise in a will since 1837 will go to the residuary devisee, if any (1 Vict. c. 26, s. 25; Key, div. "Conveyancing," p. 141, 3rd edit.)

XV. *Descent and distribution*.—The eldest son will take the real estate, subject only to his mother's dower; the personalty will be divisible as follows: a third to the widow; of the remaining two-thirds the son will have a fourth, the two daughters a fourth each, and the two grandchildren the remaining fourth between them (see Key, div. "Conveyancing," p. 145—147, 3rd edit.)

EQUITY.

I. *Parties to suits*.—An alteration as to the parties to a suit in equity has been made by the 15 & 16 Vict. c. 86, by sect. 42 of which one legatee, next of kin, heir, *cestui que trust*, or personal representative may have a decree for administration without making the other legatees, next of kin, or *cestuis que trust*, or more than one of them, parties to the bill. And trustees are enabled to represent the persons beneficially interested under the trust, in the same manner, and to the same extent, as the executors or administrators in suits concerning personal estate (see 5 Mag. N.S. 673—676).

II. *Commencing proceedings in equity*.—There are three modes of commencing proceedings in Chancery (besides the proceeding by petition in certain statutory cases), namely: 1. By a bill, which is the ordinary way in the case of a subject, or by an information in the case of the Sovereign suing, or a public right being in question;

2. By a claim, which, however, only applies to the ordinary cases of administration, foreclosure and redemption of mortgages, specific performance of agreements, partnership accounts, compelling trustees to allow their names to be issued by the *cestuis que trust* in enforcing legal claims, and for the appointment of new trustees. Even in these cases bills may be, and very frequently are, filed, though the court might in a very plain case disallow the additional costs (see 2 Mag. N.S. p. 150). The third way of commencing a suit in equity is, by a summons, which however is limited to the single case of an administration, and in the case of *real* estate only where the will vests the *whole* of the real estate in trustees for sale, with power to give receipts for the rents and produce (15 & 16 Vict. c. 86, ss. 45, 47).

III. *Appearance of defendant.*—The mode of bringing the defendant before the court is to serve him with a copy of the bill, claim, or summons; in the case of a bill the plaintiff may on the defendant's default enter an appearance for him, or proceed as on a contempt. On a claim no appearance need be entered or other proceeding taken by the plaintiff (see further 5 Mag. N.S. 680—682).

IV. *Time for amending bill.*—This is an instance of the minute knowledge of practice required by the examiners. We are not aware that there has been any decision on the point, but as formerly a plaintiff might before replication obtain an order of course to amend, so that not more than four weeks from the time of the answer being deemed sufficient had expired, and as now where a defendant answers without being required to do so, his answer cannot be deemed insufficient, and there is consequently no time limited for a plaintiff to except thereto for insufficiency, it should seem that the plaintiff might at any time before replication (or serving notice of motion for a decree) obtain an order of course to amend.

V. *Motion for decree.*—A motion for a decree cannot be made until after the defendant's time for answering has expired. It should be made before a replication is filed. One month's notice should be given of the motion to the defendant or defendants (15 & 16 Vict. c. 86, s. 15; Ord. of 7th Aug., 1852, pl. 22—26; *ante*, pp. 22—24). The decree made on such a motion will be binding on the parties to the bill, and also, after notice, in the cases mentioned in sect. 42 of the Equity Procedure Act.

VI. *Evidence.*—In the case of bills, the evidence is taken either by affidavits or by oral examination before examiners. In the case of claims, the evidence is confined to affidavits as a general rule; but witnesses may be examined orally, though this is usually confined to particular witnesses. The oral examination of the witness is preferable to affidavit evidence (see *ante*, pp. 26—32).

VII. *Commissions for witnesses, answers, &c.*—A commission to

examine witnesses, or to take pleas, answers, disclaimers or examinations, is a writ issuing out of the Court of Chancery. No commission is now required for the examination of witnesses, or for the taking of pleas, answers, or disclaimers, within the jurisdiction (15 & 16 Vict. c. 86, ss. 21, 35; *ante*, pp. 18, 26), and even in the case of witnesses out of the country it is sometimes dispensed with.

VIII. *Injunctions*.—An injunction is a judicial process, whereby a party is required to do, or refrain from doing, a particular thing. The application should be made as speedily as possible, and must be supported by affidavits (15 & 16 Vict. c. 86, s. 58). It is put in force by being served on the parties concerned, and if neglected by them they are liable to be attached for a contempt of the court. Injunctions are dissolved by motion to the court, and the defendant's affidavit, if used by him, is to be regarded merely as an affidavit (15 & 16 Vict. c. 86, s. 59).

IX. *Lis pendens*.—The filing of a bill, claim, or duplicate of an administration-summons in the Court of Chancery, operates as a *lis pendens*. The party seeking to avail himself of the *lis pendens*, as against purchasers or mortgagees, should register the suit, claim, or administration-summons in the same manner as a judgment or decree (1 & 2 Vict. c. 110, s. 17; 2 & 3 Vict. c. 11, s. 4; Key, div. "Conveyancing," pp. 150, 151, 3rd edit.)

X. *Annuity and legacies charged on realty*.—The annuitant and legatees must abate proportionally. In fact, an annuity is nothing but a legacy, payable by several instalments. The testator may, however, give annuitants a priority; and many cases have been reported where, on the presumed intention of the testator, the courts have held the annuitants entitled to priority (*Creed v. Creed*, 8 Jur. 943; *Long v. Hughes*, 7 Law Journ. O.S. Chanc. 105; *Miller v. Huddleston*, 13 Jur. 719).

XI. *Executor—Debt barred by statute*.—It has been determined that an executor is justified in paying a debt of his testator which is barred by the Statute of Limitations; and, indeed, that he may retain for his own debt, though barred by the statute, notwithstanding the statute is set up by legatees or next of kin (*Clinton v. Brophy*, 10 Irish Eq. Rep. 139; 1 Madd. Ch. Pr. 728; *Norton v. Frecker*, 1 Atk. 524).

XII. *Wife's petition—Appeal—Costs*.—This is another instance of the minuteness of practical information required by the examiners. It will be seen that the wife is not a party to the suit; but as to this, it is provided by the 15 Ord. of 26th August, 1841, that a person not being a party in any cause who has obtained an order (in any cause, 9 Beav. 210, 332), or in whose favour an order shall have been made, shall be entitled to enforce obedience to such order by the same process as if he were a party to the cause. The objec-

tion to the wife, as being one with her husband, would be got over by directing the husband to pay to her next friend.

XIII. *Wife's reversionary or contingent property.*—The nature of the contingency should have been stated, and also the kind of property. If real estate, the husband and wife could mortgage or otherwise dispose of it, the wife being examined (8 & 9 Vict. c. 106, s. 6). If leasehold, the nature of the contingency is most important (see *Duberly v. Day*, stated fully in 4 Mag. N.S. 660—662). If choses in action, then no effectual assignment can be made (4 Mag. N.S. p. 393). A policy of assurance should be effected on the life of the husband and wife; of the husband, because, in case of his death before the wife, she would not be bound by the assignment; of the wife, because the contingency might not happen in her lifetime.

XIV. *Loss of settlement.*—If a marriage settlement be lost or destroyed, the trusts of it will be carried out by the Court of Chancery, on its being satisfactorily shown, by a copy or draft, what the limitations were.

XV. *Infants—Protection of in equity.*—In all cases where the infant has property, the Court of Chancery will appoint a guardian to protect his property and person, and will prevent the infant (at least where a female) from being married without the approbation of the court, and the execution of a proper settlement. Any one interfering without authority, and converting the infant's property, or restraining his liberty, will be punished by the court as for a contempt (5 Mag. N.S. 306, 307).

BANKRUPTCY.

I. *Bankruptcy and insolvency.*—The persons subject to the laws of bankruptcy must be traders; in insolvency they are more usually non-traders, i.e., carrying on some business not within the bankruptcy jurisdiction, or persons in no business at all. Of course, traders within the meaning of the bankruptcy laws may and do sometimes, where their estate is small, pass through the Insolvent Court. The difference between bankruptcy and insolvency, as to the liability of future effects, is this: in bankruptcy the certificate frees the future effects from his old debts, whilst an insolvent's future effects may be made liable for his old debts through the warrant of attorney and judgment thereon (Key, div. "Bankruptcy," pp. 1, 2, 2nd edit.; 22 Law Tim. 160; 12 Jur. 47).

II. *Requisites of bankruptcy.*—The three conditions or requisites required to constitute a bankrupt are:—1. A trading within the meaning of the bankruptcy laws. 2. An act of bankruptcy. 3. A good petitioning creditor's debt, except, of course, where the bankrupt makes himself a bankrupt (Key, div. "Bankruptcy," p. 47, 2nd edit.).

III. *Extent of trading*.—Where a person carries on any of the trades enumerated in the statute, the extent of his trading is not inquired into; but where he is sought to be rendered a trader under some of the general words, as “seeking a living by buying and selling, or by buying and letting for hire, or by the workmanship of goods or commodities,” &c., it is important to look at the extent of trading. The principle is, that an intent to deal generally and not merely a dealing in one or two instances should be shown. One or two acts of buying and selling will not suffice, if unconnected with any intention of general dealing which, in such cases, is the important point, and one which is for the jury (Key, div. “Bankruptcy,” 17, 2nd edit.; Healey’s Bankr. Law, pp. 3, 4, 3rd edit.; 2 Steph. Com. 137, 138, 2nd edit.).

IV. *Acts of bankruptcy*.—The following are the ordinary acts of bankruptcy, besides those mentioned in the next answer, namely:—1. Departing this realm; 2. (Or) remaining abroad; 3. (Or) departing from his dwelling house, or otherwise absenting himself; 4. (Or) beginning to keep house; 5. (Or) suffering himself to be arrested or taken in execution; 6. (Or) suffering himself to be outlawed; 7. (Or) procuring himself to be arrested or taken in execution, or his goods to be attached, sequestered, or taken in execution; 8. (Or) making any fraudulent grant or conveyance of any lands, tenements, goods, or chattels, any fraudulent surrender of any copyhold lands or tenements, or any fraudulent gift, delivery, or transfer of any goods or chattels; 9. Lying in prison for twenty-one days after arrest for debt, or after detention for debt (where he was arrested for any other cause); 10. Escaping out of prison where arrested, &c., for a debt; 11. Filing a declaration of insolvency in the office of the Secretary of Bankrupts, provided a petition for adjudication is filed within two months (sect. 70); 12. Filing a petition in the Insolvent Debtors’ Court in India, &c.; 13. Filing a petition by prisoner in Insolvent Debtors’ Court in England; 14. Filing a petition for private arrangement; 15. An assignment for benefit of creditors, under and subject to the circumstances mentioned in Answ. No. X. *ad finem*.

V. *New acts of bankruptcy*.—The new acts of bankruptcy created by the 5 & 6 Vict. c. 122, (repealed, but re-enacted by the 12 & 13 Vict. c. 106) besides those arising out of the summoning of the debtor to the Bankruptcy Court, are:—1. Non-payment, or not securing or compounding for a judgment debt within seven days of personal service of a demand for immediate payment (sect. 72). 2. Disobeying any order of a Court of Equity, or in any matter of bankruptcy or lunacy, for seven days after service of a peremptory order for payment on a certain day (sect. 73). The following are the acts of bankruptcy arising out of such summoning, where the

service of the summons is personal, and provided a petition for adjudication be filed within two months of such acts; in each case the act not being complete until the eighth day (or a regular enlargement thereof), after the respective omissions or refusals. These acts are:—1. Non-attendance without lawful cause. 2. Refusing, upon attendance, to admit the demand, and not deposing that he has a good defence upon the merits, and (if required) not entering into a bond, with two sureties, to pay the amount to be recovered in an action for the demand, with costs. 3. Signing admission of the debt (such admission, if made elsewhere than before the court, being in the form specified, and attested by an attorney, who shall, by attestation, declare himself to be the attorney of the trader, and that he subscribes as such attorney), and not paying, securing, or compounding for such debt; or, 4. Admitting part, and not paying, securing, or compounding for such part; and, as to the residue, deposing to merits, and giving (if required) such bond as before mentioned.

VI. *Making a trader commit an act.*—An act of bankruptcy is an indispensable requisite to a bankruptcy, and therefore if a trader has not committed one, a creditor should serve him with a notice requiring payment of his debt and on non-payment summon him, when, if he do not depose to a good defence, give bond, if directed, pay or secure the debt, &c. (as mentioned in the previous answer), he will be considered to have committed an act of bankruptcy (Key, div. "Bankruptcy," pp. 25—27, 2nd edit.).

VII. *Declaration of insolvency.*—The filing of a declaration of insolvency is an act of bankruptcy. A petition for adjudication, relying on such a declaration as an act of bankruptcy, must be filed within two months after the declaration is filed (12 & 13 Vict. c. 106, s. 70; Key, div. "Bankruptcy," pp. 33, 34, 2nd edit.).

VIII. *Time of act of bankruptcy.*—It is not necessary that the party should continue trading up to the time when the petition is filed; so that a man when he has retired from business may become a bankrupt (by committing an act of bankruptcy after cesser of trading) in respect of debts contracted during the period of his trading (Willoughby v. Thornton, 1 Selw. N.P. 175; Doe dem. Barnard v. Lawrence, 2 Car. and Pay. 134; Dawe v. Holdsworth, Peake, 64; *Ex parte* Dewdney, 15 Ves. jun. 945), if such debts were contracted during the existence of a petitioning creditor's debt (*Ex parte* Dewdney, 15 Ves. jun. 945; *Ex parte* Bourne, 16 Ves. jun. 145); and whether or not a trader has ceased his trading, does not depend upon the mere discontinuance of it or the absence of any specific act of trading, but whether there be an *intention* to exercise or resume it, and that is a question for a jury (*Ex parte* Patterson, 1 Rose, 402; *Ex parte* Cundy, 2 Rose, 357); and in all cases

purely for the consideration of the jury (*Dance v. Wyatt*, 4 Moo. and Pay. 201). A debt accrued to the petitioning creditor after the party has ceased to be a trader, will not support an adjudication (1 Mont. 26; *Peake's Nisi Prius Cas.* 64).

LX. Partners.—An act of bankruptcy by each partner must be shown (12 & 13 Vict. c. 106, s. 97; Key, div. "Bankruptcy," p. 50, 2nd edit.).

X. Conveyance of property.—A conveyance or assignment of all a trader's property is an act of bankruptcy, as thereby the trader is prevented carrying on his trade, and this is so though the act be done for the benefit of the creditors, provided the case is not brought within the protection presently mentioned to be given by statute after three months (see *Siebert v. Spooner*, 1 Mees and Wels. 714; *Jackson v. Thompson*, 2 Qu. Ben. Rep. 887). And, indeed, it has been held that a bill of sale by a trader of all his effects to a creditor, as security for an antecedent debt, is an act of bankruptcy, although it does not purport to convey all his effects, and may have been executed in the hope of obtaining further advances from the creditor, and with the intention of continuing to carry on trade; and although such advances may have subsequently been made, and no possession taken under the bill of sale until several weeks afterwards, during which time the trader has carried on business as before (*Lindon v. Sharpe*, 7 Scott, N.R. 730; S.C. 6 Man. and Gran. 895; 13 Law Journ. N.S. 67). However, a trader may assign his effects as a security for or in payment of an antecedent debt without committing an act of bankruptcy, when he does not thereby disable himself from carrying on his trade, and has no intention to prefer a particular creditor, and does the act by legal compulsion (see *Chase v. Goble*, 3 Scott, N.R. 245; Selw. N.P. 206, 11th edit.; *Van Costeel v. Booker*, 18 Law Journ., N.S. Exch. 8. And a sale by a trader of his whole stock to a *bond fide* purchaser, paying a fair price, and ignorant of any fraudulent intention in the seller, is not an act of bankruptcy, though the seller had at the time an intention to abscond and carry off the purchase money (*Baxter v. Pritchard*, 1 Adol. and Ellis, 456). But it must clearly appear to be a sale, and not subject to the assent of the creditors of the debtor (*Exp. Zwitchenbart*, 3 Mont. Deac. and De Gex, 671; S.C. 8 Jur. 1081; see *re Marshall*, 1 De Gex, 273). The statutory protection alluded to above, as being given to an assignment for the benefit of creditors is contained in sect. 68 of the Consolidation Act, which enacts that if any such trader shall execute any conveyance or assignment by deed of all his estate and effects to a trustee or trustees for the benefit of all the creditors of such trader, the execution of such deed shall not be deemed an act of bankruptcy, unless a petition for adjudication of bankruptcy be filed within *three months* (1

Mag., N.S., p. 253) from the execution thereof, provided such deed shall be executed by *every* such trustee within fifteen days after the execution thereof by the trader, and the execution by the trader and by every such trustee be *attested by an attorney or solicitor, and notice* thereof be given within one month after the execution thereof by such trader, in case such trader reside in London or within forty miles thereof, in the *London Gazette*, and also in two London daily newspapers; and in case such trader does not reside within forty miles of London, then in the *London Gazette* and in one London daily newspaper and one provincial newspaper published near to such trader's residence; and such notice shall contain the date and execution of such deed, and the name and place of abode respectively of every such trustee and attorney or solicitor.

XI. *Time of act of bankruptcy*.—No person is liable to be made a bankrupt by reason of any act of bankruptcy committed more than twelve months prior to the filing of any petition for adjudication against him. This is so expressly provided in section 88 of the Consolidation Act.

XII. *Arrangements*.—By the 7 & 8 Vict. c. 70 (which is entitled "An Act for facilitating Arrangements between Debtors and Creditors"), any debtor unable to meet his engagements, and not being a trader within the meaning of the Bankrupt Laws, may apply by petition to a Court of Bankruptcy, and obtain protection from arrest, providing his petition be signed by one-third in number and value of his creditors. The debtor's petition must set forth the cause of inability to pay his creditors, and contain a proposition for the future payment or the compromise of his debts, and a statement of his assets and debts. Any one of the Commissioners of Bankruptcy may examine the petitioning debtor, &c., in private; and if he be satisfied with the statements made, and that none of the debts have been contracted by reason of any manner of fraud, or breach of trust, or without reasonable probability at the time of contract of being able to pay the same, or by reason of any judgment in any prosecution for breach of the revenue-laws, or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, maliciously suing out a fiat (filing a petition) in bankruptcy, or malicious trespass, he may convene a general meeting of all the petitioner's creditors, and appoint an official assignee, registrar, or a creditor to report the proceedings. If at the first meeting the major part of the creditors in number and value, or nine-tenths in value, or nine-tenths in number of those whose debts exceed £20, shall assent to the proposition of the debtor, a second meeting is to be appointed. If at the second meeting three-fifths of the creditors present in number and value, or nine-tenths in value, or nine-tenths in number of those whose debts exceed £20, shall agree

to the arrangements made at the first meeting, and reduce the terms to writing, such resolutions shall be binding, provided one full third of the creditors in number and value be present. Under this arrangement the affairs of the debtor may be settled. When this has been effected, a meeting of the creditors is to be held before the commissioner, who is to give the debtor a certificate, which shall operate as a certificate under the statute relating to bankrupts.

XIII. *Proof—Affidavit.*—The creditor must, in his affidavit or deposition, state the particulars and consideration of his claim, and that the debt was due and owing before the filing of the petition; and if he hold any security, he must state that fact.

XIV. *Joint and separate creditors and estates.*—Where an adjudication is obtained against partners, and there are joint and separate creditors and estates, joint debts must be proved against the joint estates, and separate debts against the separate estates (*Craven v. Widdows*, 2 Cha. Cas. 149; 6 Law Stud. Mag. 249; *Exp. Cook*, 1 P. Will. 500; *Exp. Hunter*, 1 Atkyns, 251; *Horsey's Case*, 3 P. Will. 23; *Eckhart v. Wilson*, 8 Term Rep. 140; *Grey v. Chiswell*, 9 Ves. 124; *Exp. Birley*, 2 Mont. D. and De G. 354). The rule is inflexible whatever be the amount of the estate; and in one case Lord Eldon said that if there be only 6d. of joint estate, joint creditors are not entitled to a dividend *pari passu* with separate creditors. The only joint estate there was a bad debt of £9, which, being put up to auction, could not be sold (*Exp. Clay*, cited Mont. and Ayr. Bankr. Pract. 188; *Exp. Peake*, 2 Rose, 54; *Exp. Buckingham*, 4 Jur. 612. Where solvent partner is dead, *Re Lomax*, 1 Mont. and Chit. 573). Where there is no joint estate or solvent partner, proof may be made against the separate estate (*Exp. Wyke*, 2 Rose, 373; Mont. and Ayr. Bankr. Pract. 192). In *Exp. Buckingham* (4 Jur. 612; S.C. 1 Mont. D. and De G. 235), it was held that the rule that a joint debt cannot be proved against the separate estate of the debtor, only applies to the case where the co-debtors are partners. (But see Mont. Deac. and De Gex, 95). However, joint creditors may vote in the choice of *assignees* under a separate adjudication against one or more of several partners (12 & 13 Vict. c. 196, s. 140). Separate creditors also are allowed to choose an inspector (who is then a kind of assignee) where their interests are plainly adverse to those of the joint creditors; but this cannot be done until after the choice of assignees (*Exp. Batern*, 1 Glyn and Jam. 269; *Exp. Dawson*, 3 Deac. and Chit. 12).

XV. *Bankrupt's leases.*—Leaseholds of the bankrupt do not vest in the assignee by virtue of their appointment; at least, not so as to render them liable, though they may accept the same if they please. The assignees, however, are not bound to take any steps with regard to the leasehold, until the landlord or the bankrupt

obliges them either to accept or reject the same (Key, div. "Bankruptcy," pp. 70, 71, 2nd edit.).

CRIMINAL LAW.

I. *Indictment*.—An indictment is a written accusation, at the suit of the Queen, against a party, of some crime or misdemeanor, presented on oath by a grand jury, and upon which, if found by them, the party is eventually tried (4 Steph. Com. 398; Key, div. "Criminal Law," p. 87, 2nd edit.).

II. *Indictable offences*.—The three classes of indictable offences are treason, felonies, and misdemeanors (Key, div. "Criminal Law," p. 114).

III. *Proceedings to commitment*.—When a complaint is made before a justice of the peace of an indictable offence having been committed within the county, or other district to which his commission extends, it is his duty to have the offender brought before him; and for this purpose he issues a summons or warrant (11 & 12 Vict. c. 42, s. 1; First Book, 418). As soon as the party appears before him, he examines the witnesses produced,—hears whatever the accused party may say in his defence,—and then discharges the party or commits him to prison, according as he judges that a sufficient case has been made out against him or not; or, instead of committing him, he may take bail for his appearance at the next sessions or assizes. A magistrate, however, frequently acts without either warrant or summons: as when a party has been taken by a constable or policeman, in any of those cases in which they are authorised to arrest parties without warrant or summons.

IV. *Proceedings before justices—Late act*.—The act of Parliament now in force for regulating the proceedings of justices of the peace with reference to persons charged with indictable offences is the 11 & 12 Vict. c. 42.

V. *Courts*.—The only court for the trial of indictable offences in each county is the court of general or quarter sessions, which are held four times in the year (1 Will. 4, c. 70, s. 35). In Middlesex, there are more than four courts in the year (7 & 8 Vict. c. 71; First Book, 472, 473).

VI. *Jurisdiction of sessions*.—By the 5 & 6 Vict. c. 38, the justices of the peace at sessions are not to try any person for any treason, murder, or capital felony, or for any felony, which, when committed, by a person not previously convicted of felony, is punishable by transportation beyond the seas for life, or for any of the following offences:—1. Misprision of treason. 2. Offences against the Queen's title, &c., or against either House of Parliament. 3. Offences subject to the penalties of *præmunire*. 4. Blasphemy, and

offences against religion. 5. Administering or taking unlawful oaths. 6. Perjury, or subornation of perjury. 7. Making, or suborning any other person to make, a false oath, affirmation, or declaration, punishable as perjury, or as a misdemeanor. 8. Forgery. 9. Unlawfully and maliciously setting fire to crops of corn, grain, or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern. 10. Bigamy, and offences against the laws relating to marriage. 11. Abduction of women and girls. Endeavouring to conceal the birth of a child. 13. Offences against any provision of the laws relating to bankrupts and insolvents. 14. Composing, printing, or publishing blasphemous, seditious, or defamatory libels. 15. Bribery. 16. Unlawful combinations and conspiracies, except such over which such justice or recorder respectively have or has jurisdiction to try, when committed by one person. 17. Stealing, or fraudulently taking, or injuring, or destroying records or documents belonging to any court of law or equity, or relating to any proceeding therein. 18. Stealing, or fraudulently destroying or concealing, any wills or testamentary papers, or any document or written instrument, being, or containing, evidence of the title to any real estate, or any interest in lands, &c.

VII. *Principal and accessory*.—A principal in the second degree is one who is *present* constructively, at least, aiding and abetting the illegal act; an accessory before the fact is one who, being *absent* at the time of the commission of the felony, procures, counsels, or abets another to commit it (Com. Dig. tit. "Justices," T. 1; 4 Black. Com. 34; Key, div. "Criminal Law," p. 76).

VIII. *Accessories*.—*None*.—There are no accessories in treason or in misdemeanors; for in cases of treason all are principals, *propter odium delicti*; in trespasses all are principals, because the law does not descend to distinguish the different shades of guilt in such petty matters as misdemeanors (4 Black. Com. 36; Key, div. "Criminal Law," p. 77, 2nd edit.)

IX. *Murder—Manslaughter—Homicide*.—Murder is a killing with malice either express or implied. Manslaughter is the unlawful killing of another without malice, as upon a sudden quarrel, or unintentionally, whilst doing an unlawful act. Justifiable homicide is where there is no fault, as by an officer having a warrant for arresting another who resists such arrest and cannot be taken without such means as, being employed, lead to his death. Excusable homicide is where one kills another in defence of his life (4 Steph. Com. 133; Key, div. "Criminal Law," pp. 22, 23, 2nd edit.).

X. *Indictment, form of*.—In an indictment for murder or manslaughter, it is not now necessary to set forth the means by which

the death of the deceased was occasioned. This is by the 14 & 15 Vict. c. 100, which is the act for simplifying the forms of such indictments (Key, div. "Criminal Law," p. 23, 2nd edit.).

XI. *Larceny*.—Larceny, at the common law, is the unlawful taking and carrying away of things personal, with intent to deprive the right owner of the same, and not being committed under the circumstances constituting the offence burglary (4 Steph. Com. 152, 153, 1st edit.; Key, div. "Criminal Law," pp. 30, 31, 2nd edit.).

XII. *Embezzlement*.—The servant would be guilty of embezzlement (see *antè*, pp. 180—182; Key, div. "Criminal Law," pp. 37—39; 4 Steph. Com. 194, 2nd edit.; 14 Jur. 513; 18 Jurist, 66).

XIII. *Perjury*.—Perjury is the crime of false swearing, which arises when a lawful oath is administered in some judicial proceeding to a person who swears wilfully, absolutely, and falsely in a matter material to the issue or point in question. The punishment by the common law was fine and imprisonment, with an incapacity of bearing testimony (see 3 Coke's Inst. 168; Com. Dig. tit. "Justices of Peace," B. 106; 4 Black. Com. 138). By statute this latter is taken away, but in lieu the party may be transported or imprisoned with hard labour (Key, div. "Criminal Law," p. 54, 2nd edit.).

XIV. *Forgery and uttering*.—Forgery is the fraudulent making or alteration of a writing, to the prejudice of another man's right, with a view to put it off as a genuine document, so as to defraud some one (Reg. v. Marcut, 2 Car. and Kirw. 356); but by s. 8 of the 14 & 15 Vict. c. 100, the intent to defraud particular persons need not be alleged or proved. It was a misdemeanor at common law, and was punishable with fine and imprisonment only; but now by statute it is in many cases felony (Clarke v. Newsam, 1 Exch. Rep. 131), and punishable with transportation or imprisonment (4 Steph. Com. 205, *et seq.* 2nd edit.). The uttering of a forged instrument, the forgery of which is only a forgery at common law, is no offence, unless some fraud was actually perpetrated by it (Reg. v. Boulton, 2 Car. and Kirw. 604).

XV. *Uttering—Evidence*.—The ordinary evidence to prove guilty knowledge in uttering a forged instrument is that the defendant has passed other forged notes, and even proof that at the time of uttering he gave a false name or address raises a probable presumption of guilty knowledge (see Archb. Crim. Plead. and Evid. 358, 8th edit.).

NOTICES OF NEW BOOKS.

PARSONS ON WILLS.

A Treatise on the Law of Wills, embodying the latest decisions in relation thereto; with an Appendix containing The Succession Duty Act. By ARTHUR PARSONS (Nottingham), one of the Attorneys, &c. London: Simpkin, Marshall and Co.

THE profession is already in possession of more than one standard work on the Law of Wills, but the chief of these are now rather out of date, and besides are very expensive works. We suppose (for the author, unlike most of his fellow-labourers, has given no Preface or Introduction), that Mr. Parsons has felt that there was an opening for a work, which, without great pretensions to originality or completeness, should give a summary of the law as it is, and a notice of the more modern decisions. Presuming this to have been Mr. Parson's aim, we can say that he has not failed. In ten chapters, occupying upwards of 150 pages, the following subjects are treated of:—

1. Wills and Testaments generally; 2. Wills of Seamen and Soldiers, Nuncupative Wills and Wills of Foreigners; 3. The Construction of Wills generally; 4. Codicils; 5. The Revocation of Wills; 6. *Donationes mortis causæ* and Legacies; 7. Executors; 8. Administration; 9. Assets and Chattels Real; 10. Charitable and Void Bequests, and the Administration of Charitable Trusts. This enumeration does not, by any means, give a complete notion of the various contents of the work: thus, for an example, from p. 142 to p. 155, we have a full and accurate statement of the Act of the last Session relating to Charities, and also of the orders issued in pursuance thereof. And beyond the immediate objects of the work we have, by way of Appendix, The Succession Duty Act, with an Index thereto.

An extract from the work will give the reader a better notion of the mode in which it is edited, than any description of ours can. The following is extracted from Chapter V. on the revocation of wills:—

“ HOW REVOKED WILL REVIVED.

“ No will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner before required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as

shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown (1 Vic. c. 26, sec. 22).

" And no conveyance or other act, made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death (sec. 23).

" The mere fact of a testator having destroyed his last will and preserved the first, has been held not sufficient *per se* to revive the first (Hooton v. Head; Phill. 31), for it must be ascertained whether it was or was not the intention of the deceased that the first will should stand—the presumption of the courts inclining against rather than in favour of the revival of a former instrument (Wilson v. Wilson; 3 Phill. 554).

" Where one entire part of a will, in duplicate, in the possession of the testator, was undestroyed, but the other part, in the possession of his solicitor, was destroyed by the testator on the executing of a subsequent will made in 1838, in terms revoking the prior will, the first was held to be revived by a codicil made subsequently to the second will, though referring to the first will merely by date; and that such reference was sufficiently indicatory of the intention to revive, as required by the 22nd section of the 1 Vic. c. 26, and that moreover parol evidence was not admissible to establish a mistake in the date (Payne v. Trapps, 11 Jur. 155). And where a married lady, having under her settlement freehold property settled to her separate use, with power to dispose of it by will, exercised that power by devising a certain part of the property to A. for life, with remainder to her nephew, and gave all the other freehold tenements which she had in anywise power to dispose of, to her nephew for life, with remainder to his children. She afterwards purchased some leasehold tenements out of her separate property, and had them assigned to M. in trust, as she should by deed, will, or codicil appoint; and in exercise of that power, she by a codicil bequeathed the leasehold to her nephew, and confirmed her will. Some time afterwards she purchased the reversion in fee of the leaseholds, and had it conveyed to A. in trust, as she should by deed or will appoint. She then made another codicil, in exercise expressly of the power reserved to her by the settlement and of all other power, and thereby, after reciting the specific devise made by her will, she gave the property which was the subject of that devise to A. in fee. The second codicil was not deemed a re-publication of the will, and therefore the reversion did not pass by the residuary devise in the will, but the

testatrix died intestate as to it (*Jowitt v. Beard*, 12 Ju. 933; 18 L. J., 53 C.).

"So where a man, having children by a first marriage, made his will, and then upon his second marriage settled his personal estate on himself for life, then to raise £100 for his wife, and then to apply the personalty as he by deed or will should appoint, and in default thereof unto his issue—it was determined, upon the apparent intention, that the prior will was wholly revoked (*Leigh v. Norbury*, 13 Ves. Junr. 340). And where a person who was dangerously ill made a will in favour of his *intended* wife, but afterwards recovered and was married, and had four children, who with the wife survived him, and the testator had carefully preserved the will and recognised it, but never re-executed it, it was determined to be a revocation (*Matson v. Magrath*, 13 Jur. 350, P.C.).

"It is necessary to observe, that in the above case there appeared a tacit condition annexed to the will, at its execution, by which the court was guided in making its decision.

"A will made under 1 Vic. c. 26, s. 11, remains operative unless expressly revoked, although the maker of such will lives in England several years after the date of that will. Thus, John Vaux Leese died in England in 1852, having made his will whilst in active military service in the East Indies, agreeably to the 11th section of the Wills Act, in the words following:—'I am just recovered from a rather severe bilious attack; lest another may leave me unable to will my goods away, or lest I am knocked over by a bullet, as we go against Gwalior to-morrow, this is my will and testament, made in gratitude for my late recovery. I have funds amounting to some 500 rupees in Government Savings Bank. This I will bequeath to my brother R. V. Leese, also the whole proceeds from the sale of my horses, buggy, and furniture. My old Arab horse Nick is not to be sold, but to be given to Captain Siddons, of the First Light Cavalry, as a memo of my love and esteem. I am not indebted to any man, except current expenses for housekeeping and clothes, to no great account; my clothes, therefore, I wish to be burnt.—J. V. LEESE, Camp Lahore, near Gwalior, Dec. 23, 1843.' Codicil.—'My horse Nick was shot under me at the battle of Maharajpoor, May 28th, 1844.' The deceased returned to this country in April, 1845, and remained here ever since. Nothing passed under the will, as the property thereby bequeathed was disposed of; upon the question arising as to whether letters of administration should pass with the will annexed or without it, the court decreed administration with the will annexed (*In re J. Vaugh*, 17 Jur. 216)."

The work appears to us to be very accurate, and though occasionally the references are not so exact and precise as could be desired (as at p. 95, "Com. Dig." "1 Roll. Ab." "2 Will. Exors.;"

p. 96, "St. Com.;" p. 97, "Bac. Abr.;" pp. 98, 102, "2 Bla. Com.;" p. 100, "Powell on Mtgs.;" p. 109, "Bla. Com.;" pp. 110, 111, "2 B. C.," &c.), yet taken altogether, it shows that Mr. Parsons has performed his task in a satisfactory manner, and we can recommend it to those of our readers who wish for a summary of the modern law upon wills, and the ordinary matters arising thereout.

WHARTON'S ARTICLED CLERKS' MANUAL.

A Manual for Articled Clerks: containing Courses of Study, as well in Common Law, Conveyancing, Equity, Bankruptcy, and Criminal Law, as in Constitutional, Roman, Civil, Ecclesiastical, Colonial, and International Laws, and Medical Jurisprudence; a Digest of all the Examination Questions, with the new General Rules, Forms of Articles of Clerkship, Notices, Affidavits, &c.; and a List of the proper Stamps and Fees: being a comprehensive Guide to their successful Examination, Admission, and Practice as Attorneys and Solicitors of the Superior Courts. Seventh edition, by J. J. S. WHARTON, Esq., M.A., Oxon., Barrister-at-Law, author of "The Law Lexicon," "An Exposition of the Laws relating to the Women of England," &c. *Qui bene dividit, bene discit.*—London: Butterworth, 7, Fleet-street. 1854.

Having given the above title *in extenso*, we think we are in a great degree discharged from the necessity of stating the general contents of the work. As to the value of Mr. Wharton's labours, we are sorry that we have not had time to give that attention to the book which would enable us to give a decisive opinion, but at another time, and under more favourable circumstances, we may return to the work, and do what we are not now prepared to accomplish.

It will be observed that the work has (according to the title-page) reached a *seventh* edition. Conformably to the very *intelligent* doctrine of some so-called reviewers, we might content ourselves with such an announcement, as the fact of the sale of the preceding editions is to be taken as conclusive evidence of the real and undoubted worth of the work. But we cannot subscribe to such a doctrine, more particularly as those who are in the habit of most frequently using this (to them) convenient and compendious mode of reviewing, have chiefly done so when reviewing their own productions.

We should state that Mr. Wharton's volume contains upwards of 500 pages, but as the pages are very small, the work is about equal in extent to 300 pages of our Magazine. This will enable the reader to judge what amount of information he is likely to obtain concerning the very great and important heads of the law noticed in the work; and it must be borne in mind that more than 100 pages are

devoted to the questions at the examinations. A very cursory inspection of the work has enabled us to detect what we should consider, a great fault in so small a volume, viz., a straining after effect by grandiloquent and laboured passages like the following:—

“ From the wonderful extent of our sway, shown by the fact that the sun never sets upon the dominions of England, (for when the great luminary departs from this country, and from Gibraltar, Sierra Leone, the Islands of Ascension, and St. Helena, which are almost longitudinally parallel with us, it rises upon Newfoundland—continues its course over the Northern Isles, Labrador, and Canada—passes on, in its path of grandeur, from Lake Superior to the West India Isles—travels to the island-continent of Australia—then sheds its glories upon Ceylon, and proceeds over the extensive empire of Hindoostan), from the extraordinary developement of our colonies, from the extent of emigration, and from the gigantic expansion of our glorious commerce, whereby the civilized nations of the globe are brought into more active intercommunication, colonial and international law have become of essential consequence to the English lawyer; the fourth and fifth chapters are therefore devoted to their discussion, and to a brief sketch of their conflicts. Let not the professors of our own laws any longer permit the continentalists to continue their inquiries and researches into the law of nations, without even an attempt at rivalry on our part; let us no longer endure the reproach of the Genevan Publicist: *Les Anglois sorties depuis long temps des écoles de la philosophie législative!* ”

We really cannot say who this great Genevan Publicist may be, but we should divine from the French which is here given us (and which fully supports the bad character which London-French had acquired in the time of Chaucer), that he must have been more familiar with Lincoln's-inn-fields than Geneva, or, as a friend at our elbow suggests, must have known more of Le Mann's biscuit-shop than Lake Lemán. However, let us proceed to a more practical portion of the work, namely to that devoted to conveyancing, and Mr. Wharton tells us—

“ In the rude and primitive state of human society, when men were hunters and fishers, there was entertained no notion of an interest in the soil which could endure beyond the time of actual enjoyment and occupation. Property and possession were then identical; the abandonment of the latter putting an end to the continuance of the former. The subsistence of the invisible right to property in land, apart from its actual occupation, is too refined a conception to be in anywise appreciated by a savage, roaming in search of his prey, without regular habits or fixed abode; the setting sun finding him reclining in repose far from the spot where his rising surprised him asleep,—yesterday's shelter unremembered ere the morrow's twilight

warns him to seek a scanty slumber beneath the beestling drag of spreading tree.

"In the second phase of society—the shepherd's life—the idea of property began to be recognised, though not as entirely disjoined from occupation. This arose from the necessity of a longer and more permanent use of the soil for the purpose of the pasturing and propagation of flocks and herds. But even then the nomadic habit forbade the appreciation, and rendered unnecessary the acquirement, of land-property. It was not until social life developed itself in the practice of agriculture—when men began to plant the vine, and cultivate the olive—when the rude hut became permanent, and community commenced, that a property or estate in the soil was created, sought after, obtained, and defended. To inquire into the origin of private property, and by what means the negative community of things was abolished, is interesting, though the subject is more within the sphere of the natural philosopher than the domain of the lawyer. Grotius and Puffendorf, Locke and Paley, have written elegantly and ingeniously on the matter, tracing the rights of property from their proximate disposition, by municipal regulations, to their original foundation—the Divine will.

"The present complicated rights of property are the result of civil society—the offspring of political necessity as contradistinguished to the primary suggestions of the law of nature. Property is derived from political rights, rather than political rights from property."

It is evident that Mr. Wharton has, all through the volume, had Mr. Warren's work in his view, and has thought it necessary to ape his anecdotal and rhetorical style, which, however, formed the great drawback from the utility of that work; and though rather to be expected from the author's well-known style and manner, and so far natural in him, has a bad appearance in Mr. Wharton's smaller work, and offers so striking a contrast to the other portions as to suggest that they are rather the result of industrious collection than of *impromptu* suggestion.

Having said thus much, and more than we had at first intended, we wish it to be understood that we are not condemning the work as a whole, and we rather think we shall be better satisfied with the more solid portions of Mr. Wharton's volume when we have leisure to give it a more careful perusal.

THE EXAMINATION.

At the last Easter Term examination, out of 107 candidates, five only were rejected, which is a very small proportion compared with the number which have at other times been rejected.

In answering No. 4, p. 328 of the Equity questions, we stated our views of what we considered to be the practice, but since then we have discovered a decision of V. C. Kindersley, to the effect that where a voluntary answer has been put in, under sec. 13 of the 15 & 16 Vict., c. 86, the plaintiff *cannot* obtain an order to amend as of course *after* four weeks from the time when, under the old practice, the answer would have been deemed sufficient (*Rogers v. Fryer*, 2 Equity Rep., 253). This is rather a singular decision, but we mention it for the purpose of repeating that such questions show that the examiners expect articulated clerks to be acquainted with the minutest points of practice: indeed, the question under consideration is a notable instance, for we have not been able to find a decision elsewhere than in a new series of reports of no great circulation. Do the examiners expect an articulated clerk to read *all* the reports which may be published? The point raised by the question is one upon which opinions, independent of decision, would not be likely to be in unison. Thus we know that, on this very question, out of three equity barristers, two were of the opinion that an order of course could be obtained at any time before replication, whilst the third thought otherwise, but could not give any satisfactory reasons. However, let our readers take warning, and prepare themselves more carefully on practical points, such as the examiners appear to delight in.

DIGEST OF RECENT CASES.

MORTGAGOR AND MORTGAGEE.—*Foreclosure*—*Paying off prior incumbrancer (plaintiff) by subsequent incumbrancer (defendant)*—*Receiver*.—Where a redemption and foreclosure suit is instituted by a mortgagee against a mortgagor and prior and subsequent mortgagees, it is the right of any of the defendants before decree to pay off the plaintiff his principal, interest, and costs, and have the bill dismissed. The court will not stay proceedings in such a suit at the instance of a defendant, without actual tender to the mortgagor of the money due to him for principal and interest. After

payment of principal and interest to the mortgagor and his costs paid or secured, the other defendants have no right to have the suit prosecuted for their advantage. A receiver appointed in such a suit is *functus officii* on the dismissal of the bill, and any money in his hands belongs to the mortgagor. *Paynter v. Carew*, 23 Law Times Rep. 21.

CONTRACT.—*By letters—Offer and acceptances.*—A contract may be entered into by letters between the parties; but where an offer is made on the one side there must be an explicit acceptance thereof on the other side, without the addition of any other terms; in fact, a simple assent to the offer should be given. This strictness has been carried to an extreme extent in the following case, it being held that where an offer by letter to supply goods is accepted, but the answer to the offer adds a further stipulation, to the effect that goods already supplied should be paid for at the rate contained in the offer, that is a new term in the agreement and must be shown to be accepted. *Heyward v. Barnes*, 23 Law Tim. Rep. 68.

MUTUAL CORRESPONDENCE.

The only additions we have to report to the lists published *ante*, pp. 15, 16, 75, 136, 242, are the following:—Mr. C. N. Alldritt, of Ashby-de-la-Zouch; Mr. T. A. Gleed, of Horbling-Folkingham, Lincolnshire; Mr. W. H. Randles, at G. Salter's, Esq., Ellesmere, Shropshire.

We shall give a *corrected* list, either in the next number or the one following that, and we shall therefore be glad to receive additional names, and any alterations required in the lists already published. We hope to find that our *new* subscribers, consequent upon the alterations, will join in correspondence, and so give more life and vigour to the system.

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